

# *Tribal Labor Ordinance Technical Assistance Tool*

July 2001

## BACKGROUND

In order for Indian tribes to develop and implement effective housing and community development programs, tribes must first adopt comprehensive tribal codes that address a broad range of housing and community development issues. The tribal code development process, however, is a difficult, expensive, and time-consuming process.

Consequently, tribal governments are in need of substantial technical assistance concerning the development of the legal infrastructure necessary to facilitate housing and community development in Indian country. Technical assistance should incorporate both general information concerning the tribal code development process and information concerning specific tribal codes that are critical for tribal housing and community development.

In 1995-1996, the Office of Native American Programs (ONAP) contracted for the design and development of a comprehensive Tribal Housing Code (including eviction and foreclosure procedures). The Tribal Housing Code was intended to provide tribal governments with an outline and an illustrative guide for drafting their specific tribal codes and to greatly reduce the cost of designing individual tribal housing codes.

In 1999, the Tribal Law and Policy Institute contracted with ONAP to substantially update and revise the Tribal Housing Code as part of a comprehensive Tribal Legal Code Project (see <http://www.tribal-institute.org/codes/overview.htm>). Under this comprehensive Tribal Legal Code Project, the Tribal Law and Policy Institute surveyed existing tribal codes and identified best practices. This Tribal Legal Code Project included a broad range of tribal codes that are critical for tribal housing and community development – such as zoning, land use and planning, building, commercial, corporations, environmental review, and probate codes. However, the Tribal Legal Code Project did not include tribal labor codes.

ONAP has now identified the need for Tribal Labor Code technical assistance tools based on the Davis Bacon exemption language included in the December 27, 2000 amendment (Public Laws 106-568 and 106-569) to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). In order for a Tribe to qualify for an exemption under the law, a Tribal Labor Ordinance must be in place. To assist the Tribes, ONAP has identified the need to provide sample ordinances and resources – similar to the Tribal Housing Code and Tribal Legal Code technical assistance products developed in previous years.

ONAP has indicated that this project will create a framework for the development of a full-fledged technical assistance tool and should utilize a somewhat similar approach to that used for the Tribal Housing Code, including:

- Identification, analysis, and annotation of existing tribal codes (identifying best practices),

- Circulation of an outline of components of a model code, and
- Presentation of the draft model code at a HUD-sponsored conference so that there is review and comment (or consultation).

Although there are some existing tribal labor codes, it is very important to note that no existing tribal labor code is based on the Davis Bacon exemption language included in the December 27, 2000 amendment (Public Laws 106-568 and 106-569) to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Furthermore, (1) no existing tribal labor code addresses the full range of issues that could be included in a comprehensive tribal labor code and (2) no existing tribal labor code has been developed since the recent Supreme Court decisions of Atkinson Trading Co. Inc. v. Shirley and Nevada v. Hicks that have established a new foundation for tribal labor legislation (thus requiring tribes to revisit their existing labor laws).

It would be possible to develop a tribal labor code that simply allows for a tribe to take advantage of the Davis Bacon exemption language. However, it would be much more in keeping with the development and implementation of effective housing and community development programs to develop a comprehensive tribal labor code that attempts to address a much broader range of tribal labor issues and the challenges presented by recent U.S. Supreme Court decisions.

## TRIBAL LABOR ORDINANCE TECHNICAL ASSISTANCE TOOL COMPONENT PARTS

This Tribal Labor Ordinance Technical Assistance Tool was developed for review and comment (consultation) at the 8<sup>th</sup> Homeownership Summit in St. Paul, Minnesota in July 2001. It consists of the following four component parts (please note that part #3 and part #4 are included in a separate attachment):

### **Part #1: Background Report/Commentary Concerning Tribal Labor Codes**

This component part addresses three specific issues. First, legal analysis on a broad range of issues that must be addressed prior to the development of a “model” tribal labor code. Second, commentary on the need for a “model” tribal labor code and issues that the code should address. Third, an identification of the best practices in labor legislation as reflected in the reviewed tribal labor codes. (Please note that copies of the syllabi and court opinions in two recent U.S. Supreme Court cases - Atkinson Trading Co. Inc. v. Shirley and Nevada v. Hicks – have also been included in the resource packet).

### **Part #2: Outline of “Model” Tribal Labor Code**

Part #2 is an outline of a “model” tribal labor code based on the review of existing tribal labor codes (see component part #3 and #4 below) and the background report/commentary concerning tribal labor codes (see component part #1).

**Part #3: Existing Tribal Labor Codes – Summary and Analysis of Best Practices**

Part #3 is an extensive database of summary and analysis of selected tribal labor codes. It includes a review and analysis of 15 selected existing tribal labor codes. Moreover, it identifies best practices among these existing tribal labor codes.

**Part #4: Existing Tribal Labor Codes – Examples of 5 Codes Representing Best Practices**

Part #4 is the identification and provision of 5 existing tribal labor codes representing best practices. The five selected codes are as follows:

1. Confederated Tribes of the Colville Reservation (Washington) – this code is the most comprehensive example of the Tribal Employment Rights (or TERO) codes.
2. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Montana) – this code represents an innovative effort to address specific reservation conditions.
3. Hoopa Valley Tribe (California) – another innovative code.
4. The Navajo Nation (Arizona-New Mexico-Utah) – the most comprehensive code.
5. Stockbridge-Munsee Community of Mohican Indians (Wisconsin) – a short, but very innovative code.

*Please note however that no existing tribal labor code is based on the Davis Bacon exemption language included in the December 27, 2000 amendment (Public Laws 106-568 and 106-569) to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Furthermore, (1) no existing tribal labor code addresses the full range of issues that could be included in a comprehensive tribal labor code and (2) no existing tribal labor code has been developed since the recent Supreme Court decisions of Atkinson Trading Co. Inc. v. Shirley and Nevada v. Hicks that have established a new foundation for tribal labor legislation (thus requiring tribes to revisit their existing labor laws).*

**Development of TRIBAL LABOR ORDINANCE TECHNICAL ASSISTANCE TOOL**

The staff and consultants of the Tribal Law and Policy Institute developed this Tribal Labor Ordinance Technical Assistance Tool. The following were the key personnel:

***Project Director: Jerry Gardner***

Jerry Gardner is the Executive Director of the Tribal Law and Policy Institute, an Indian owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the improvement of justice in Indian Country and the health, well-being, and culture of Native peoples. He serves as the Institute's Executive Director and as the Project Director of the Institute's Indian Housing Projects including (1) a model *Tribal Housing Code* (revised 1999 version); (2) the *Tribal Legal Code Project* that provided comprehensive legal resources for tribal governments – extensive resources for the development of other tribal codes needed to develop and implement effective housing and community development programs, including zoning, land use and planning, building, commercial, corporations, environmental review, and probate codes; and (3) an Indian Housing resource page on the Tribal Court Clearinghouse ([www.tribal-institute.org](http://www.tribal-institute.org)). He has also served as an adjunct lecturer at the University of California, Berkeley, School of Law (Boalt Hall), consultant with UCLA's American Indian Studies Center, and Administrator for the National American Indian Court Judges Association

(NAICJA). Mr. Gardner has more than 20 years experience working with Indian tribes, Indian housing authorities, and Indian tribal court systems. He served as the Senior Staff Attorney with the National Indian Justice Center (NIJC) from NIJC's establishment in 1983 until January 1997. As NIJC Senior Staff Attorney, his responsibilities included (1) the design and development of more than 30 NIJC training manuals, including Indian Housing Law training manuals; (2) conducting more than 200 conferences, regional training sessions, and on-site training sessions, including Indian Housing Law sessions, and serving as lead instructor at most of these sessions; (3) the editor and contributing author for the *Indian Housing Law Quarterly*; (4) the director of NIJC's code drafting projects, including the Tribal Housing Code developed for ONAP. Mr. Gardner has also worked for the U.S. Senate Committee on Indian Affairs, the national office of the Legal Services Corporation, and the American Indian Lawyer Training Program.

***Primary Author: James W. Zion***

James Zion served as the Solicitor for the Navajo Nation Supreme Court from 1991-2001. His position as Solicitor required work in planning court operations, preparing court rules and policies, drafting court and advisory opinions, training and advising judges, assisting in court related litigation, and assuming other responsibilities to improve and maintain the court system. He served as the General Counsel for the Navajo Housing Authority from 1988-1990 and he was named a Certified Housing Manager by the National Center for Housing Management. He also served as the Assistant Attorney General of the State of Montana for the Department of Labor and Industry and the Human Rights Commission. Mr. Zion has served as a legal advisor for various tribal and state agencies. He has also served an adjunct lecturer for various educational institutions. He has written extensively on Indian law issues, especially issues concerning peacemaking, mediation, and other dispute resolution and problem solving mechanisms. He served as co-author for most of the National Indian Justice Center (NIJC) training manuals concerning Indian Housing Law and served as a trainer at numerous NIJC training sessions. He also served as one of the primary authors of the Tribal Legal Code Project that provided comprehensive legal resources for tribal governments – extensive resources for the development of Indian Housing Codes and other tribal codes needed to develop and implement effective housing and community development programs, including zoning, land use and planning, building, commercial, corporations, environmental review, and probate codes.

***Research Assistance:***

Tribal Law and Policy Institute staff and consultants, including Pat Sekaquaptewa, Elton Naswood, and Angela Mooney-D'Arcy, provided research assistance.

*This Technical Assistance Tool was developed under a contract between the Office of Native American Programs (ONAP) of the U. S. Department of Housing and Urban Development (HUD) and ICF Consulting (Contract C-OPC-21172, Task Order No. 3, Sub-Task L). Points of view or opinion stated in this document are those of the authors and do not necessarily represent positions or policies of the U. S. Department of Housing and Urban Development.*

Part #1: **BACKGROUND REPORT AND COMMENTARY  
ON TRIBAL LABOR CODES**

July 2001

INTRODUCTION

This report is a survey and commentary on fifteen Indian nation labor codes<sup>1</sup> to identify the best practices in existing Indian Country legislation.<sup>2</sup> This report addresses three specific issues: First, a legal analysis on a broad range of issues which must be addressed prior to developing a model tribal labor code; Second, commentary on the need for such a code and issues one should address; Third, an identification of the best practices in labor legislation as reflected in the codes which were reviewed.

This is a difficult task for several reasons: First, there is not a great deal of literature on labor law in Indian Country as such. There are almost none on general labor issues. Second, most of the labor codes which were reviewed were limited to Indian preference in employment on or a near an

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<sup>1</sup> The fifteen labor codes selected for review were from the laws of the Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation of California, the Cherokee Nation of Oklahoma, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Montana), the Gila River Indian Community of the Gila River Indian Reservation (Arizona), the Hoopa Valley Tribe of California, the Lummi Tribe of the Lummi Reservation (Washington), the Navajo Nation (Arizona, New Mexico and Utah), the Oglala Sioux Tribe of the Pine Ridge Reservation (South Dakota), the Stockbridge-Munsee Community of Mohican Indians (Wisconsin), the Tlingit & Haida Indian Tribes of Alaska, the Turtle Mountain Band of Chippewa Indians (North Dakota), the Confederated Tribes of the Umatilla Reservation (Washington), and the White Mountain Apache Tribe of the Fort Apache Reservation (Arizona). These Indian nations are officially recognized by the Government of the United States as such using the indicated names. Bureau of Indian Affairs, Department of the Interior, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 65(49) Fed. Reg. 13298 (2000).

<sup>2</sup> Two model codes were also reviewed, namely a ATitle 7: Tribal Business Operations code, and the ATribal Employment Rights Ordinance of the Band of Indians, in NATIONAL INDIAN JUSTICE CENTER, EMPLOYMENT LAW IN INDIAN COUNTRY 271 (1995).

Indian reservation. Third, most of the litigation in federal, state or Indian nation courts has been over Indian preference or tribal jurisdiction over employers and not conventional labor issues.

Fourth, as this report was being researched and written, the Indian law community was waiting for two important United States Supreme Court decisions on jurisdiction to be handed down, because the rulings in the two cases will impact any future regulatory or adjudicatory legislation in Indian Country.

The two decisions are Atkinson Trading Co. Inc. v. Shirley,<sup>3</sup> and Nevada v. Hicks.<sup>4</sup> Those two decisions establish a new foundation for Indian labor legislation, which will require all Indian nations to revisit their existing labor law. Fifth, and finally, any consideration of a future model tribal labor code must address a broad range of issues, including development policy and even economic and moral questions.<sup>5</sup>

The subjects identified above will be addressed as follows: First, the report will discuss general findings from the review of the fifteen labor codes, identifying some of the legislation, which illustrates the best practices in legislation. Second, there will be an analysis of the Atkinson Trading Post and Nevada v. Hicks decisions with a discussion of their implications for future labor legislation.

Third, there will be discussion of legislative approaches to future labor codes which will also address contemporary economic development and policy issues. That discussion will include a review of a recent change in federal Indian housing law which permits Indian tribes to adopt statutes

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<sup>3</sup> No. 00-454, 532 U.S. \_\_\_\_ (May 29, 2001).

<sup>4</sup> No. 99-1994, 533 U.S. \_\_\_\_ (June 25, 2001).

<sup>5</sup> Martha C. Knack & Alice Littlefield, Native American Labor: Retrieving History, Rethinking Theory, in NATIVE AMERICANS AND WAGE LABOR 3, 41 (Alice Littlefield & Martha C. Knack, eds. 1996). Labor as the working of a living humanity should be studied within a larger social and cultural context. *Id.* For a general history of Indians and wage labor, see, Patricia C. Albers, From Legend to Land to Labor: Changing Perspectives on Native American Work, in *Id.*, at 245.

and regulations on prevailing wages as a platform for general labor law reform for Indian Country.

#### GENERAL FINDINGS FROM CODE REVIEW

Most of the codes implement federal Indian legislation which permits a preference to hire individual Indians or contract with Indian-owned businesses on or near an Indian reservation. While the federal policy of according a hiring preference to Indians in federal employment dates from at least 1834,<sup>6</sup> it was not until the 1974 decision in Morton v. Mancari<sup>7</sup> that there was confidence in the constitutional validity of Indian preferences. The legislation reviewed by the Court was Section 16 of the Indian Reorganization Act,<sup>8</sup> which provides that the Indian Office (the Bureau of Indian Affairs and Indian Health Services today<sup>9</sup>) must give a preference to qualified Indians for appointment to any vacancy in positions. The Court also noted the provisions Title VII of the Civil Rights Act of 1964 which exempt the preferential employment of Indians by Indian tribes or by “industries located on or near Indian reservations.”<sup>10</sup> The Court also reviewed other Indian preference legislation and policies.<sup>11</sup> Following that review, the Court ruled that Indian preferences in employment are not “racial discrimination,” or even a “racial preference.”<sup>12</sup> Instead, the Court explained, reviewing the history of federal Indian policy, it is a political

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<sup>6</sup> Morton v. Mancari, 417 U.S. 535 at 541 (1974).

<sup>7</sup> *Id.*

<sup>8</sup> 25 U.S.C. Sec. 472.

<sup>9</sup> 417 U.S. at 537 n. 1.

<sup>10</sup> *Id.*, at 546, citing 42 U.S.C. Secs. 2000e(b) and 2000e-2.

<sup>11</sup> *Id.*, at 548-549

<sup>12</sup> *Id.*, at 553.

preference which is permissible.<sup>13</sup>

The timing of the decision in 1974 was important, because when the Indian Self-Determination and Education Assistance Act became law the next year,<sup>14</sup> congress addressed Indian preference in the context of the delegation of authority to Indian nations to provide federal services to Indians. The Act states that any “contract, grant, or sub grant” under the Act, the Indian Reorganization Act of 1934, or “any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians,” must provide, “to the greatest extent feasible,” “preferences and opportunities for training and employment in connection with the administration of such contracts and grants to Indians,” and “preference in the award of subcontracts and sub grants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.”<sup>15</sup>

Given the approval of Indian preference hiring, and the requirement of Indian preferences in grants and contracts in the Indian Self-Determination and Education Assistance Act, Indian nations took advantage of federal preference legislation by enacting statutes and codes which require Indian preference in some or all employment on or near a reservation.

There was a new movement to enact a “tribal employment rights ordinance” and create a “tribal employment rights office” to enforce that law, popularly known as a “TERO.” There are significant problems in passing such legislation. The first is the territorial scope of the law. If a

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<sup>13</sup> Id. 553-554, 553 n. 24.

<sup>14</sup> Pub. L. No. 96-638, 88 Stat. 2203 (codified at 25 U.S.C. Secs. 450-450n, 455-458e) (the Public Law citation gives the Act its popular nickname, A638”).

<sup>15</sup> 25 U.S.C. Sec. 450e(b).



given tribe sought to regulate employment “near” a reservation (since Title VII of the Civil Rights Act of 1964 does not define “near”), what area would that be? Some legislation defines “near” as being within daily commuting distance, other legislation defines it as counties which are within or adjacent to the reservation, and some laws use the land reserved by treaty as the frame of reference. Many TERO laws indicate that the employment and contracting preference applies within the “external boundaries” of the given reservation, while others restrict its application to trust lands within the reservation.<sup>16</sup> Some TERO laws seem confident that there can be jurisdiction over employers and businesses (and particularly non-Indian entities) based upon the “on or near” language of Title VII, while others appear to recognize the problem of limited civil jurisdiction over non-Indians.<sup>17</sup>

There is difficulty in defining what activities are covered by the TERO law, and most of the codes have lengthy (and sometimes turgid and confusing) definitions which attempt to define business activities by organizational form (i.e. corporations, partnerships, business trusts, etc.) and identified activities. Some codes attempt to regulate only “significant” business activities, defined by the number of employees a business has or the dollar amount of its reservation-based earnings. Some codes require that the tribe itself must give preference in employment and contracting, while others exempt the tribe from coverage. Several of the codes exempt federal and state (including municipalities, counties, and other “local governments”) jurisdictions from the application of the law, while others specifically include them. Several codes exempt charitable and non-profit

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<sup>16</sup> Not all the legislation is clear about what it means by “trust lands.” There are two general kinds of Indian trust land: Land where the United States holds title for a given Indian tribe or group, and allotted lands, where the United States holds title for individual Indians. Both are within the definition of “Indian country” at 18 U.S.C. Sec. 1151.

<sup>17</sup> See, Montana v. United States, 450 U.S. 544 (1981) (Indian tribes do not have civil regulatory

organizations, but others cover them.

There is a division about who is an “Indian” for purposes of the Indian preference. Some codes limit coverage to members of tribes which are officially recognized by the United States, while others make reference to individuals the United States treats as “Indian” for purposes of carrying out its trust responsibility to Indians. The problem is that there are at least thirteen different definitions of “Indian,” and an individual may or may not qualify, depending upon the given federal program.<sup>18</sup> The Navajo Nation Supreme Court adopted the “Cohen” definition that an “Indian” is a person who meets two qualifications, “(a) that some of his ancestors lived in America before its discovery by the white race, and (b) that the individual is considered an ‘Indian’ by the community in which he lives.”<sup>19</sup> All of the employment codes referenced federal definitions of the term, and none established their own definition.

There are also difficulties identifying an “Indian-owned” business, enterprise, or entity in definitions. Most of the codes simply stated that any business which is “owned” by Indians in the sense of having 51% of the ownership or control is an Indian-owned business. One code requires a 60% ownership interest. Several of the codes provide great detail in definitions or application for certification requirements about the nature of the business, the exercise of ownership and control, the receipt of profits, and the actual nature of the business in its operations. One of the problems with Indian contracting preference has been non-Indian businesses forming false Indian

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jurisdiction over non-Indian activities on fee land except in limited circumstances).

<sup>18</sup> See, Testimony of the Little Shell Tribe of Indians of Montana, AIndian Definition Study” (U.S. Department of Education hearing, Crow Agency, Montana, January 14, 1980). See also, Schmasow v. Native American Center, 1999 MT 49 (Mont. 1999) (application of Indian preference to a member of an unrecognized tribe in an off-reservation health program).

<sup>19</sup> Navajo Nation v. Hunter, No. SC-CR-07-95, slip op. at 5-6, 2 Nav. A.R. 411, at 413 (Nav. Sup. Ct. 1996) (citing a republished version of the original 1942 edition of FELIX S. COHEN’S

ownership “fronts,” partnerships or joint ventures with Indians simply to take advantage of preference contracting. There is a lot of money to be made in Indian housing, and many of the complaints about the quality of housing in Indian Country stem from abuses by some irresponsible contractors.

There is a great deal of difference in the regulatory and enforcement structure in the codes. Most establish a “TERO” or Tribal Employment Rights Office, with a director and staff. The director usually has the power to make regulations and rules to implement the code, along with the power to do inspections, receive complaints, carry out investigations, and sanction violators. Many establish a board or commission to set policy in rules, regulations and orders and determine whether there have been violations of the law in contested hearings. A few of the codes provide for judicial review of the orders and decisions of directors or commissions, primarily by the trial level of the tribal court. Some provide for direct review by a court of appeals or appellate review after trial court action. The standard of review varies, with the court being able to address errors of fact (or not) or errors of law. Some use the general administrative law standard that review is limited to the “arbitrary, capricious, and contrary to law” test. In jurisdictions where there is both a TERO director and a board or commission, few codes clearly separate the rule-making, agency investigation and adjudication functions. That is, rule making is an administrative, quasi-legislative, function. It is logical that if there are to be two bodies, one would set policies in regulations and rules, and the other would enforce them. There is a mixed adjudication function, with several of the TERO directors being able to hold hearings and make a quasi-judicial determination that an employer or other party has violated the TERO law, subject to review in a commission hearing. Most codes provide that a sanctioned employer or dissatisfied employee can

appeal to the board or commission. Some codes are not careful about separating the functions of the two organizations as to communications about alleged violations of the law and a later adjudicative hearing, while the Navajo Nation code and others prohibit communications between the investigative arm and the hearing arms. A few of the codes permit the board or commission to investigate a complaint and later hear it as a contested matter. Some commissions have elected tribal council members as members.

There are several problems with mixed structures. First, there should be a clear separation of investigative functions and quasi-judicial adjudication. It is proper for an agency head to investigate, hold his or her own hearings and make a determination which is subject to a contested case hearing. However, due process of law requires a “fair hearing” before a disinterested and impartial hearing body, and permitting the quasi-judicial body to learn facts before a hearing or discuss a proposed order with an official who performs a prosecutorial function<sup>20</sup> destroys the impartiality of the hearing body. Given that all the codes provide for civil penalties, which are a form of punishment,<sup>21</sup> it is doubtful that any elected official should sit on a labor board or commission, because of the prohibition against bills of attainder in the Indian Civil Rights Act of 1968.<sup>22</sup>

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<sup>20</sup> Most TERO directors do perform a prosecutorial function, because the codes uniformly provide for civil sanctions for violations.

<sup>21</sup> Although civil penalties for willful violations of a TERO code are in fact a form of punishment,” the fact that non-Indians may receive punishment in the form of a civil penalty (sometimes called a fine) does not divest a tribal court or agency of jurisdiction. See, Halwood v. Cowboy Auto Sales, Inc., 124 N.M. 77, 946 P.2d 1088 (Ct. App. 1977) (enforcing a Navajo Nation civil judgment with punitive damages against a non-Indian business).

<sup>22</sup> 25 U.S.C. Sec. 1302(9). A bill of attainder” is the action of a legislature or legislative body inflicting punishment,” including statutes which take away vested rights. In the case of Dodge v.

The obvious model for most of the TERO codes is the procedural arrangement for handling discrimination cases under Title VII of the Civil Rights Act of 1964, namely there is an executive body which investigates, determines probable cause for violations of the statute, and attempts to conciliate the case. In the federal system, the Equal Employment Opportunity Commission (EEOC) performs that function, and if it cannot conciliate or investigate the case in time, it issues a “right to sue letter” and the complainant then files an original complaint in federal court. Many states have state anti-discrimination agencies and commissions which combine the investigation and adjudication functions in separate divisions of the agency. The problem lies in accusations of partiality or bias in structure or in fact. Great care must be taken in separating functions and assuring fairness in structure and procedure, because there is already doubt and skepticism about the fairness of Indian nation courts,<sup>23</sup> and the same holds true of quasi-judicial adjudication.

Only one tribal jurisdiction addressed the problem of a general law to establish administrative regulation, investigation, sanctioning, and adjudication. That is, many states and the Government of the United States have an administrative procedures act, which regulates rule

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Nakai, 298 F. Supp. 26 (D. Ariz. 1969) the court ruled that there was a bill of attainder when the Navajo Nation Advisory Committee excluded a lawyer from the Navajo Nation. Query whether the presence of some legislative members on a board or commission could constitute a bill of attainder if a punitive action, such as a civil penalty, is considered to be a “Apolitical” act. While this is an old Indian Civil Rights Act case, it is likely that exclusion could be challenged in a federal habeas corpus action if the enforcement of a punitive civil penalty caused a severe actual or potential restraint on liberty (e.g. as with seizing property to enforce the fine, as several codes provide). See, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2<sup>nd</sup> Cir. 1996), cert. den., 117 S. Ct. 610 (1996) (stripping tribal member of citizenship and banishment).

<sup>23</sup> See, e.g. the concurring opinion of Justice Souter in Nevada v. Hicks, supra n. 4, at 10-12, which recites the litany of popular suspicions about the partiality and integrity of Indian nation courts, from the fact that the U.S. Bill of Rights does not apply to them, to the use of traditional Indian law, political control of Indian judges, and a lack of judicial review as “unwarranted intrusions on ... personal liberty.”

making, enforcement activity, and administrative adjudication. Most of the tribal codes attempt to address such matters, but often, the same issues are addressed in several codes, and that makes them lengthy and repetitive. There are times when code provisions conflict. Most federal and state labor legislation establishes bodies to administer and enforce employment standards, with varying modes of administrative review in adjudication and a separation of investigative and adjudicatory functions. It makes sense for Indian nations to adopt comprehensive administrative law standards in a separate piece of legislation so that they can take a full look at their administrative law scheme. There have been many changes in administrative law over the years, and drafters of such legislation have many models in the form of model or uniform legislation or attempts at a thorough restatement of administrative law.

Almost all the tribal codes make reference to federal anti-discrimination agencies, such as the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance (OFCCP), and most require the TERO director or commission to work with them to combat discrimination against Indians or enter into cooperative agreements with them. No code has a provision for cooperation with state anti-discrimination agencies. A few codes recognize the fact that Title VII provides for “deferral agencies,” whereby a state anti-discrimination agency can investigate, hear, and decide discrimination cases, and provide for tribal negotiation with the EEOC to attain that status.<sup>24</sup> Unfortunately, most TERO codes incorporate federal civil rights agency regulations, rulings, and case interpretations into tribal law by reference. That is not a good practice, because one jurisdiction should rarely automatically incorporate another’s law because there is no control over that law. That is, if another jurisdiction’s law is adopted by

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<sup>24</sup> Research failed to disclose the result of such efforts.

reference, that will include later amendments to it or unfavorable judicial interpretations. Many TERO ordinances were passed when the civil rights climate of the United States was different, and Indian nations may wish to consider contemporary interpretations of civil rights law and enforcement policies when it comes to the desire to aggressively deal with anti-Indian discrimination. A fresh approach and new cooperative ventures are needed to refocus on a problem which still exists.

Some TERO codes recognize jurisdiction problems, or anticipate them, and require “voluntary” Indian preference compliance. A few codes ask for it on a voluntary basis for “near” reservation business operations, and one code distinguishes between a “consensual” relationship with the tribe for the application of the code and asks for voluntary compliance and cooperation where there is not such a consensual relationship. That code provision most likely recognizes the Montana Rule<sup>25</sup> that Indian nations do not have civil jurisdiction over non-Indians unless there is consent in business arrangements or a vital tribal interest. While the consent and business relationships issue will be discussed below, consent and voluntary cooperation and the means to achieve them are important. There is an emerging theory of law having to do with “social norms theory” which recognizes that in most instances, Americans do not “go to the law,” and they behave toward each other on the basis of shared values.<sup>26</sup> The theory is that there are ways problems can be approached without using coercion or resorting to “legal” mechanisms,<sup>27</sup> and

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<sup>25</sup> Montana v. United States, supra n. 17

<sup>26</sup> See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

<sup>27</sup> See, e.g., Arti Kaur Rai, Regulating Scientific Research: Intellectual Property Rights and the Norms of Science, 94(1) NORTHWESTERN U.L.REV. 77, 95-100 (1999) (the academic community moderating the ability to obtain patents on genetic materials) and Jeffrey J. Rachlinski, The Limits of Social Norms, 74 CHICAGO KENT L. REV. 1537 (2000) (general review of the

there are non-punitive and consensual ways of dealing with problems.<sup>28</sup> There is an assumption, rooted in the history of past commercial dealings with Indians and their nations that non-Indians tend to disrespect or exploit Indians. There is a great deal of language to that effect in the various resolution preambles and purposes sections of the codes reviewed here. However, there are new initiatives in Indian Country, often prompted by federal officials, which seek to establish a business climate where respectable and responsible businesses will come to Indian Country and where Indian business people will have new opportunities. That kind of climate is perfect for an effective use of social norms theory, because businesses that agree with Indian advancement and a healthy business climate will voluntarily obey civil rights norms, rules of business ethics, and the goals Indian nations establish.

#### RECENT DEVELOPMENTS IN JURISDICTION

The beginning point for today's jurisdictional limitations for Indian labor codes is the case of Montana v. United States, where the United States Supreme Court ruled that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers of the tribe which are conducted on fee land, with two exceptions: first, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements;" and second, a "tribe may ... exercise civil authority over the conduct of non-Indians on fee lands

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theory).

<sup>28</sup> See, e.g., Dan M. Kahan, Privatizing Punishment: Strategies for Private Norm Enforcement in the Inner-City, 46 UCLA L. REV. 3 (2000) and Darlene R. Wong, Stigma: A More Efficient Alternative to Fines in Detering Corporate Misconduct, 3 CAL. CRIM. L. REV. 3 (2000) (Stigma" punishments are effective, but praising those who follow the law is even more effective).



within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>29</sup> A political scientist who reads those two limitations would conclude that an individual’s “consent” could come from actual dealings and practices, and that formal, written, consent would not be necessary. For example, the law recognizes mutual consent in common law marriage, and there is liability for informal business partnerships where partners hold themselves out as such. One would think that an Indian nation could make its own determination of what political integrity, economic security or health and welfare” happen to be, and base legislation upon findings that a given kind of activity affects the tribe’s political integrity, economic security, and public health and welfare. That is essentially the definition of “police power,” which is the power to enact laws for the “good and welfare of the commonwealth” and to secure “comfort, health, and prosperity.”<sup>30</sup> That is, of course, why it has been important for Indian nation legislatures to make specific and detailed findings of the purposes of a given law in the preamble to a resolution or in legislative findings and statements of purpose. The usual canon in reviewing federal and state legislation is that legislative findings are important to see whether a given statute was within the legislature’s power, and those findings are usually recognized. However, several questions linger after Montana: What form must the consent take, and how specific must it be? What kinds of activities have a “direct effect” on political integrity, economic security and tribal health or welfare? Does it matter, for jurisdiction, whether the non-Indian’s conduct took place on fee land or on Indian trust land?

The Montana decision was said to be the test of the limit of tribal regulatory authority, when, and under what circumstances, an Indian nation could regulate the activities of non-Indians

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<sup>29</sup> 450 U.S. at 565, 566.

on fee land within a reservation. Many practitioners of Indian affairs law assumed that Indian courts could adjudicate any case that arose within the exterior boundaries of their reservations without limitation. The case of Strate v. A-1 Contractors<sup>31</sup> addressed some of those questions. It ruled that where a non-Indian woman was injured by a truck driver for a non-Indian construction company, (1) the non-Indian driver and his company did not have a “consensual” relationship with the tribe or its members (although it was working on a construction project on the reservation), and (2) since the tribe had given up its power to exercise a landowner’s rights by granting a right-of-way for the highway where the incident occurred, the tribal court did not have jurisdiction. That was a ruling on tribal authority for the adjudication process. Even after Strate, there was an assumption that where a non-Indian conducted activities which impacted or implicated government, there was consent, and the place of an occurrence answered the question of jurisdiction.

Those lingering questions have been answered, somewhat. The case of Atkinson Trading Company, Inc. v. Shirley,<sup>32</sup> addressed the validity of a Navajo Nation hotel occupancy tax on a non-Indian business. In 1916, Hubert Richardson wanted to trade with wealthy Navajo cattlemen, so he built the Cameron Trading Post near the Little Colorado River and Cameron, Arizona.<sup>33</sup> At the time, it was outside the Navajo Nation. In 1934, the United States Congress expanded the Navajo Nation Reservation eight miles south so that the trading post fell within reservation

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<sup>30</sup> BLACK’S LAW DICTIONARY 1317 (4th ed. 1968).

<sup>31</sup> 520 U.S. 438 (1997).

<sup>32</sup> *Supra*, n. 3.

<sup>33</sup> *Slip op. Id.*, at 1 (The opinion of the Court, delivered by Chief Justice Rehnquist).

boundaries.<sup>34</sup> That did not alter the status of Richardson’s property, which continued to be fee land.<sup>35</sup> Richardson’s small trading post evolved into a business complex which includes a hotel, restaurant, cafeteria, gallery, curio shop, retail store, and a recreational vehicle facility.<sup>36</sup> The current owner, Atkinson Trading Company, benefits from the fact that the “trading post” is located near the intersection of a highway that goes into the Grand Canyon and a highway that connects Flagstaff, Arizona with the Glen Canyon Dam so it benefits from the tourist trade.<sup>37</sup>

In 1992, the Navajo Nation enacted a hotel occupancy tax of 8% of the room rate. The tax is on hotel guests, but the hotel is required to collect it and give it to the Navajo Nation Tax Commission.<sup>38</sup> Cameron Trading Post paid approximately \$84,000 in room taxes each year.<sup>39</sup> Atkinson (the trading post owner) challenged the validity of the tax, and the issue was whether or not it “consented” to Navajo Nation taxation of operations on fee land.

Chief Justice Rehnquist began with the general proposition that tribal jurisdiction is limited: Unless power is given in a treaty or a federal statute, Indian tribes "must rely upon retained or inherent sovereignty."<sup>40</sup> “Retained” and “inherent” sovereignty can be explained this way: When Indian nations entered into treaties with the United States, they “retained” all powers

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<sup>34</sup> Id.

<sup>35</sup> Id., at 2.

<sup>36</sup> Id.

<sup>37</sup> Id. The opinion does not mention the fact that U.S. Highway 89 is a major route for Asnow birds” from the north who winter in Arizona, and that sales of crafts by Navajo vendors along the highway has an important impact on the local Navajo economy.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id., at 3.

they did not specifically surrender. That is where we get the term “reservation” (which usually refers to “retained” lands under a treaty), and the same doctrine applies to non-treaty tribes. They all reserve certain powers to address public health, welfare and safety, and those are “inherent” powers. They are what is needed to get the job done. Despite that, Chief Justice Rehnquist went on to explain that in the Montana case, the Court found that “Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.”<sup>41</sup> He reviewed the Montana and Strate rulings, above, and then went on to address prior taxation precedent. In the Merrion decision,<sup>42</sup> the Court upheld an oil and gas severance tax based upon the tribe’s powers to exclude nonmembers from tribal land,<sup>43</sup> control economic activity within the reservation, and give certain benefits to nonmembers, including police protection, other governmental services, and “the advantages of a civilized society.”<sup>44</sup> The Chief Justice then said that such factors did not apply, because the tax approved in Merrion dealt with transactions on Indian trust lands, and “An Indian tribe’s sovereign power to tax, whatever its derivation, reaches no further than tribal land.”<sup>45</sup>

Going then to the consent foundation for civil jurisdiction, the Navajo Nation asserted that

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<sup>41</sup> Id., at 3-4.

<sup>42</sup> Merrion v. Jicarilla Apache Tribe, 544 U.S. 130 (1982).

<sup>43</sup> Note that the opinion uses the term “tribal land” rather than “reservation.” This language could be a signal that in the future, and particularly on checkerboarded reservations, Indian nations will not have the power to exclude persons from the reservation. Cameron Trading Post made that argument in one of its cases before the Navajo Nation Supreme Court.

<sup>44</sup> Atkinson, *supra* n. 3, at 6.

<sup>45</sup> Id., at 7. In footnote 5 on this page, the Court answered another question that puzzled Indian law practitioners doesn’t 18 U.S.C. Sec. 1151, the federal “Indian country” definition mean what it says that Indian country includes fee land and rights-of-way? The footnote simply says that the statute does not confer jurisdiction.

there was a consensual relationship because of “numerous services provided by the Navajo Nation.”<sup>46</sup> The Navajo Nation police patrol the highways near the trading post, the Navajo Nation emergency medical services department will respond to an emergency call from the trading post, and the Navajo Nation’s fire department will provide fire protection.<sup>47</sup> The opinion states that while Indian nations can charge an “appropriate fee” for services rendered, “the generalized availability of tribal services [is] patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land.”<sup>48</sup>

Going to the problem of when there is a consensual relationship, the opinion says that “The consensual relationship must stem from ‘commercial dealing, contracts, leases, or other arrangements,’“ and “a nonmember’s actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.”<sup>49</sup> The Court reiterated its position that the provision of tribal services to nonmembers does not constitute consent, while giving no further guidance on what actually does constitute consent.

The Court then examined the effects of the trading post on the Navajo Nation.<sup>50</sup> It argued that Cameron’s status as a federally-licensed Indian trader, the employment of almost 100 Navajos, the fact that the trading post derives its business from tourists visiting the reservation, large amounts of tribal land around the property and the “overwhelming Indian character” of the

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<sup>46</sup> Id., at 8-9.

<sup>47</sup> Id., at 9. Footnote 7, Id., indicates that the fire department has responded to Aa fire at the trading post.”

<sup>48</sup> Id., at 9.

<sup>49</sup> Id.

<sup>50</sup> Id., at 11.

Cameron Chapter are relevant factors to show that under the circumstances, Cameron’s operations had an impact on the Navajo Nation.<sup>51</sup> While acknowledging that, the opinion says that “we fail to see how petitioner’s operation of a hotel on non-Indian fee land” threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”<sup>52</sup>

The Court concluded by noting that while Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory,” “their dependent status generally precludes extension of tribal civil authority beyond these limits.”<sup>53</sup> The Court found the Navajo Nation tax was “presumptively invalid” under that principle.<sup>54</sup> That means that there is a general presumption against any civil jurisdiction over non-Indians.

The decision in Nevada v. Hicks addressed the question of “whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.”<sup>55</sup> Hicks is one of about 900 members of the Fallon Paiute-Shoshone Tribes of western Nevada.<sup>56</sup> In 1990, he came under suspicion of having illegally killed a California

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<sup>51</sup> Id.

<sup>52</sup> Id., at 11-12 (citing Montana). The Court also explained, in footnote 12, Id., that the second Montana exception is not a “Necessity” test for civil authority to support jurisdiction, but a test based only on “nonmember conduct that threatens the Indian tribe.” Id. (Italics in the original).

<sup>53</sup> Id., at 13 (Citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).

<sup>54</sup> Id.

<sup>55</sup> Supra, n. 4, at 1 (Opinion of Justice Scalia for the Court).

<sup>56</sup> Id.

bighorn sheep off the reservation, and a state game warden got a search warrant.<sup>57</sup> The issuing judge required the approval of the Fallon Tribal Court because he felt he had no jurisdiction on the reservation.<sup>58</sup> The warden then got a tribal court search warrant and searched Hick's yard, accompanied by a tribal police officer. He found the head of a Rocky Mountain bighorn sheep, a species of sheep other than the one Hicks was suspected of killing.<sup>59</sup>

About a year later, a tribal police officer told the warden about seeing two mounted bighorn sheep heads in Hick's home, and the warden again got both state and tribal search warrants.<sup>60</sup> This time, three wardens and tribal officers searched Hick's home, but the search was unsuccessful.<sup>61</sup>

Hicks claimed that his sheep heads were damaged and that the search was beyond the bounds of the warrant, so he brought suit against the tribal judge who issued the warrant, the tribal officers, and the state wardens in the Tribal Court in and for the Fallon Paiute-Shoshone Tribes.<sup>62</sup> He sued for trespass to land and chattels (personal property), abuse of process, and the violation of his civil rights (the denial of equal protection and due process and an unreasonable search and seizure) under 42 U.S.C. Sec. 1983.<sup>63</sup> The Tribal Court, the Tribal Appeals Court, and the Ninth

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<sup>57</sup> Id.

<sup>58</sup> Id., at 1-2.

<sup>59</sup> Id., at 2. Hicks was suspected of having killed a California bighorn sheep, which was apparently a protected species.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Id. 42 U.S.C. Sec. 1983 is the Civil Rights Act of 1871, which provides for suits against

Circuit Court of Appeals all agreed that the tribal court had jurisdiction, given the fact that Hick’s home is on tribal land within a reservation.<sup>64</sup>

The first question was whether the tribal court had jurisdiction to adjudicate tortious conduct by state wardens executing a search warrant for evidence of an off-reservation crime.<sup>65</sup> Justice Scalia’s opinion began with the principle that a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction when it comes to nonmembers.<sup>66</sup> The unanswered question is whether adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction.<sup>67</sup> To answer that, the first question was whether the Fallon Paiute-Shoshone Tribes could regulate state game wardens executing a search warrant for evidence of an off-reservation crime as an exercise of either inherent sovereignty or under a grant of federal authority.<sup>68</sup>

Under the prior precedents, a tribe could not regulate nonmember activities on land over which the tribe could not “assert a landowner’s right to occupy and exclude.”<sup>69</sup> In this case, the land was tribally owned within a reservation.<sup>70</sup> Justice Scalia pointed out that the prior decisions did not make distinctions based upon the status of the land, and “The ownership status of land ... is

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persons Acting under color of state law” who violate the U.S. Constitution or federal laws.

<sup>64</sup> Id., at 3.

<sup>65</sup> Id.

<sup>66</sup> Id. (Citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)).

<sup>67</sup> Id., at 4 (Italics in the original).

<sup>68</sup> Id.

<sup>69</sup> Id., at 5 (citing *Montana*).

<sup>70</sup> Id.



only one factor to consider in determining whether regulation of the activities of non-members is necessary to protect tribal self-government or to control internal relations.’’<sup>71</sup> While the Court used land status in several of its decisions, “the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.”<sup>72</sup> The Court then went on to discuss whether regulatory jurisdiction over state officers is “necessary to protect tribal self-government or control internal relations,”“ and if not, whether Congress has conferred that jurisdiction.<sup>73</sup>

The opinion next examined the kind of power Indian nations have: They have the authority to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and the right to make their own laws and be ruled by them.<sup>74</sup> In this instance, “Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.”<sup>75</sup>

Continuing, Justice Scalia said that “Our cases make clear that the Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at the reservation’s border.”<sup>76</sup> The exercise of state authority within a reservation is limited by the principle that Indians have the right to make their own laws and be governed by them, but the rule requires an accommodation of the interests of the

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<sup>71</sup> Id., at 6.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id., at 7.

<sup>75</sup> Id.

<sup>76</sup> Id. At this point, Justice Scalia observed that while tribes “are often referred to as >sovereign entities,’ an Indian reservation is part of the state. Id., at 7-8.

Tribes, the Federal Government and the State.<sup>77</sup> While state law is generally inapplicable to on-reservation conduct involving only Indians, when “state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land.”<sup>78</sup> In this particular situation, the question was whether the authority to exercise state jurisdiction within a reservation gives the “corollary right to enter a reservation (including Indian-fee lands),” and “several of our opinions point in that direction.”<sup>79</sup> After reviewing other precedents, the opinion summed up:

We conclude today ... that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations to “the right to make laws and be ruled by them.” The State’s interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.<sup>80</sup>

The Court then proceeded to another question, state authority in Indian Country, noting that “The States’ inherent jurisdiction can of course be stripped by Congress.”<sup>81</sup> However, that has not been done, there is no federal authority for tribes to hear cases under federal statutes, and the Court concluded that states have the right to serve process in Indian Country, so state officers can enter a

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<sup>77</sup> Id., at 8.

<sup>78</sup> Id.

<sup>79</sup> Id., at 9. The opinion uses a new term, “Indian-fee lands,” in several places without defining it. It is likely that “Indian” means lands held in trust for a tribe or individual Indians (allotments), and “fee” refers to lands held in fee and other non-Indian land.

<sup>80</sup> Id., 10-11. The Court adopted the Black’s Law Dictionary definition of “process” as “any means used by a court to acquire or exercise its jurisdiction over a person or over specific property.” Id., at 10. That would cover a wide range of civil and criminal process.

<sup>81</sup> Id., at 11.

reservation to investigate or prosecute violations of state law occurring off reservation.<sup>82</sup>

The opinion then addressed the specific issue of whether a tribal court, as a court of general jurisdiction, has the authority to entertain claims under 42 U.S.C. Sec. 1983.<sup>83</sup> While it is true, the opinion explains, that state courts can adjudicate cases invoking federal statutes because they are courts of “general jurisdiction,” that does not apply to Indian nation courts.<sup>84</sup> Saying that it is wrong to assert that tribal courts are courts of “general jurisdiction,” “A state court’s jurisdiction is general, in that it ‘lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.’ Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”<sup>85</sup> While some statutes “proclaim” tribal court jurisdiction over some questions of federal law, no provision in federal law provides for tribal court jurisdiction over Section 1983 actions.<sup>86</sup>

This decision was issued at the end of the Supreme Court’s year 2000 term, and the last

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<sup>82</sup> Id., at 12.

<sup>83</sup> Id.

<sup>84</sup> Id., at 13.

<sup>85</sup> Id.

<sup>86</sup> Id., at 14. The Court overlooked the fact that most Indian nation judicial codes have language from the 1935 Bureau of Indian Affairs ALaw and Order Code” which permits the court to apply Aapplicable” federal law. Many of those codes were approved by a secretarial order which arguably makes such approval a federal Aregulation” in administrative law. See, 25 U.S.C. Secs. 1 and 9 (presidential and Commissioner of Indian Affairs authority to make rules and regulations in Indian affairs).

Monday of the term is when the most contentious decisions are issued. While Justice Scalia's opinion was the opinion of the Court, and the other justices concurred with the result, Justice Souter gave a concurring opinion (joined by Justices Kennedy and Thomas), Justice Ginsburg wrote a separate opinion (for herself alone), Justice O'Connor rendered a concurring opinion (joined by Justices Stevens and Bryer), and Justice Stevens did a separate concurrence (joined by Justice Bryer).<sup>87</sup> This is not the place to review the separate concurring opinions, and Justice Scalia (and some of the press) called Justice O'Connor's concurrence with the Court's opinion a "dissent." Generally, while the Court was unanimous in agreeing that Indian courts do not have adjudicatory jurisdiction over state officials, the disagreement was over whether Justice Scalia went too far in his announcement of what the proper Indian law principles happen to be. The issue of when there is consent by implication stemming from a non-Indian's activities is still unclear, and some of the disagreement between Justices Scalia and O'Connor was based upon O'Connor's complaint that the consent issue is still not clear.

At end, these two new decisions on Indian nation civil regulatory and adjudication jurisdiction tell us that consent usually cannot be obtained through normal business dealings without a specific agreement (a question still somewhat up in the air in the Nevada v. Hicks decision); non-Indian impacts on the integrity of tribal government and public welfare must be direct and significant; there is no Indian nation jurisdiction (at least over nonmembers) on non-trust land; there is no Indian nation jurisdiction outside the reservation (as in the "on or near" provisions of the tribal labor codes); there is no jurisdiction over state, county or municipal officials (as with labor code provisions covering states and state officials); and there is a general presumption that there is no tribal civil jurisdiction over non-Indians that must be overcome. It

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<sup>87</sup> Note that Stevens and Bryer joined O'Connor's concurring opinion while having their own.

may well be, given the language in these opinions, that civil jurisdiction over nonmember Indians is also subject to challenge. While some may disagree and find these to be overly restrictive conclusions, if law (as some legal philosophers say) is about predicting what courts will do in the future, then these conclusions may well be accurate, given today's Indian law climate.

#### LEGISLATIVE APPROACHES TO FUTURE LABOR CODES

Some of the legal issues to be addressed in future labor codes include: (1) The applicability of federal legislation to Indian tribes as "laws of general application," (2) the preemption of tribal law by federal law, (3) the nature of the Indian preference, and (4) the devolution or sharing of power with the federal government and state governments. There are also a few miscellaneous issues. Aside from legal issues, future labor codes must take policy factors into account, including how and why Indian nations exercise sovereignty for economic development.

The first problem is this: When Congress enacts a federal labor law, to what extent does it apply to Indian nations as a "law of general application"? These questions initially arose when Congress enacted the Occupational Safety and Health Act. When Congress passes a law, doesn't it apply to everyone? The usual rule is that when a federal statute of general applicability is silent on the issue of including Indian tribes, it will not apply if (1) the law affects "exclusive rights of self-governance in purely intramural matters,"<sup>88</sup> (2) application of the law "would abrogate rights guaranteed by Indian treaties," or (3) there is proof "by legislative history or some other means that Congress intended [a statute] not to apply to Indians on their reservations."<sup>89</sup> That rule has been applied in different ways. In one case, the Occupational Safety and Health Act did not apply

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<sup>88</sup> This means matters involving the tribe and its members only.

to the Navajo Nation because of a treaty provision which limited the kinds of federal employees who could enter the Reservation, and OSHA inspectors were not among them.<sup>90</sup> However, in a case where the treaty spoke to the tribe's "exclusive use" of the reservation, that language was held not to oust the application of OSHA.<sup>91</sup> Similarly, the Employment Retirement Income Security Act (ERISA), a federal retirement law, was held to apply to tribes.<sup>92</sup> A problem which is related to the exceptions above, but is trickier, is the extent to which a federal devolution or grant of authority to the states would impact tribes and thus not permit a full exercise of state jurisdiction.<sup>93</sup>

When drafting Indian Country labor legislation, great care must be taken to examine federal labor law to assure that the tribal law complies with federal requirements. There is a great deal of movement in this area, and the latest developments will need to be examined to see if there has been any new law on point, or whether there is pending litigation that calls into question the application of a given federal employment statute to an Indian nation.

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<sup>89</sup> Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

<sup>90</sup> Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).

<sup>91</sup> U.S. Department of Labor v. Occupational Safety & Health Review Common, 935 F.2d 182 (9th Cir. 1991).

<sup>92</sup> Lumber Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683 (9th Cir. 1991), cf. Smart v. State Farm Insurance Co., 868 F.2d 929 (7th Cir. 1989). For general reviews of the problem and related employment issues, see, Vicki J. Limas, *Application of Federal and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L. J. 681 (1994); William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995); and Kristen E. Burge, *Comment: ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291 (2000).

<sup>93</sup> See, Washington, Dept. Of Ecology v. Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

The next area, federal preemption, is a related but slightly different area. To what extent does federal legislation preempt or oust Indian nations from enacting legislation on a given subject by taking exclusive control over a legal subject.<sup>94</sup> One example is a ruling of the Navajo Nation Supreme Court that despite federal legislation which gives the states authority to regulate worker's compensation for employment within Indian Country, a separate cause of action could be maintained against an employer for an occupational injury.<sup>95</sup>

State labor and employment laws (with the special exception of worker's compensation law) generally do not apply in Indian Country,<sup>96</sup> but the Nevada v. Hicks ruling may cause a great deal of litigation on that issue in the future, depending upon the state's interest in protecting non-Indian employees under state law. It is one thing when tribes regulate their own employees, but there may be problems if a tribe attempts to regulate all employment and all employees within its reservation boundaries.<sup>97</sup> To what extent does going beyond the regulation of a tribe's own employees (by statute or tribal personnel policies) implicate a state interest or give an opening for federal law?

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<sup>94</sup> See, Daniel W. Long, Employment Law on Indian Land, <<[http://www.modrall.com/articles/article\\_33.html](http://www.modrall.com/articles/article_33.html)>> (October 1, 1999) (Visited on June 26, 2001).

<sup>95</sup> Id., citing Nez v. Peabody Western Coal Co., Inc., No. SC-CV-28-97 (September 22, 1999). The issue is in litigation in federal court now, with certified questions from the U.S. District Court for the District of Arizona pending before the Navajo Nation Supreme Court. The problem is that there is a federal statute which permits the states to extend worker's compensation law coverage to Indian Country, and we do not know if it preempts or prevents Indian nations from exercising jurisdiction over employees other than tribal employees.

<sup>96</sup> Id., citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

<sup>97</sup> See, Helen M. Kemp, Fallen Timber: A Proposal for the National Labor Relations Board to Assert Jurisdiction over Indian-Owned and Controlled Businesses on Tribal Reservations, 17 W. N. ENG. L. REV. 1 (1995) (discussing "Atribal employee only" versus general regulatory exercises of tribal jurisdiction).

There has been a great deal of discussion about the exemption of Indian tribes from Title VII of the Civil Rights Act of 1964 and its implications.<sup>98</sup> The most recent and most important decision on Indian preference hiring is the case of Dawavendewa v. Salt River Project.<sup>99</sup> The tribal code review showed that several tribal labor codes assumed that tribal member preference is permitted under the thinking that if Indian preference in employment is supported as being political and not racial, then it makes sense that political affiliation with the tribe where the job is located would be permitted. Other codes assume that some sort of “local” preference by residence with the reservation is permissible. In Dawavendewa,<sup>100</sup> the court ruled that federal law and regulations preempt tribal member preference and only a general preference for “Indians” is permitted under federal law. It is likely that federal courts would take the same approach for “local” preferences as another means of achieving prohibited tribal member preference. Aside from the fact that tribal preference may be eliminated if the Ninth Circuit Court of Appeals decision is accepted in other parts of the United States, employment preference is under fire. Aside from the law review commentaries attacking it or suggesting ways to defeat it, there is

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<sup>98</sup> See, e.g., Vicki J. Limas, *Sovereignty as a Bar to Enforcement of Executive Order No. 11,246 in Federal Contracts with Native American Tribes*, 26 N.M.L. REV. 257 (1996); Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Business*, 25 FLA. ST. U. L. REV. 679 (1998); and *Seminole Tribe, Flores and State Employees: Reflections on a New Relationship*, 2 EMPL. RTS. & EMPLOY. POL’Y J. 175 (1998).

<sup>99</sup> 154 F.3d 1117 (9th Cir. 1998), cert. den., 68 U.S.L.W. 3432 (January 10, 2000). See also, Daniel W. Long, *Tribal Preferences under Title VII after Dawavendewa* (January 20, 2000), <<[http://www.modrall.com/articles/article\\_45.html](http://www.modrall.com/articles/article_45.html)>> (Visited on June 26, 2001).

<sup>100</sup> 154 F.3d 1117 (9<sup>th</sup> Cir. 1998), cert. den., 68 U.S.L.W. 3432 (2000).



legislation pending in Congress which would eliminate the preference.<sup>101</sup>

Finally, we reach the issue of “devolution.” There are two ways of approaching Indian labor regulation. The first is the conventional application of Indian law.<sup>102</sup> The second is to think about ways to shift power and authority to Indian nations. That can be done in federal legislation to increase the authority of Indian nations to freely pursue economic development initiatives, where Congress is advised by economists,<sup>103</sup> and it can be done through increased tribal, federal and state cooperation. Devolution is “the effort to shift decision-making power downward in the political structure from central to local governments.”<sup>104</sup> There is a general movement in federal government to transfer greater authority to the states (in legislation and court decisions), and there are some movements in the states to shift authority to counties and municipalities. Another part of this process is state recognition of the benefits of cooperative agreements with Indian nations to recognize their authority (with or without prompting by federal officials).<sup>105</sup> That requires a careful

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<sup>101</sup> H.R. 5523, the ANative American Equal Rights Act.” Brian Stockes, Congressional legislation targets Indian preference, *Indian Country Today* (November 1, 2000); <<<http://www.indiancountry.com/art.../headline-2000-11-01-02.shtm>>> (Visited on June 27, 2001).

<sup>102</sup> See, G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N. DAK. L. REV. 267 (1996). Many assumptions about jurisdiction in many law review articles will need to be revised in light of the Akinson and Hicks decisions reviewed above.

<sup>103</sup> See, e.g., the testimony of Professor Joseph P. Kalt of the Harvard Project on American Indian Economic Development at Harvard University presented to the Senate Committee on Indian Affairs on September 17, 1996. It is a forceful economic argument in favor of Indian sovereignty and legislation to support and encourage it.

<sup>104</sup> Stephen Cornell & Jonathan Taylor, *Sovereignty, Devolution, and the Future of Tribal-state Relations 1*, National Congress of American Indians Mid-Year Session, Juneau, Alaska, June 26, 2000.

<sup>105</sup> *Id.*

analysis of the arguments for and against tribal-state cooperation and a recognition that (1) states lose nothing, and in fact have a lot to gain from tribal economic success; (2) Indian nation governments are in fact competent governments; with a demonstrated track record of success, and (3) there is no “race to the bottom” when Indian nations assume authority, but rather a new competition for excellence.<sup>106</sup> The development of tribal labor and employment codes is an essential part of successful economic development initiatives which will benefit everyone.<sup>107</sup>

Finally, we reach an important miscellaneous issue, dispute resolution in general and the means to get nonmember compliance. There have been suggestions in this review that a lot can be done to get voluntary compliance, and there is great value in tribal-federal-state cooperation. What happens when there is a dispute? Tribal administrative quasi-judicial bodies must have integrity. While many of the tribal labor codes have sufficient due process protections, there are some institutional issues (addressed above). Is there a way to deal with suspicions that non-Indian cannot get a fair hearing before a tribal administrative body or court? One possible approach would be various forms of alternative dispute resolution at least to address inter-jurisdictional issues.<sup>108</sup>

The consent problem, which was at issue in both the Atkinson and Hicks cases, is obtaining the consent of non-tribal businesses in the first place. The cases make it clear that implied consent by activities places a seemingly impossible burden on Indian nations, and it is obvious that the

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<sup>106</sup> Id., at 4-7.

<sup>107</sup> See, WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell & Joseph P. Kalt, eds. 1992).

<sup>108</sup> See, Lynn H. Slade, Alternative Disputes Resolution in Inter-Jurisdictional Disputes: An Industry Perspective (November 13, 1997); <<[http://www.modrall.com/articles/article\\_25.html](http://www.modrall.com/articles/article_25.html)>> (Visited on June 26, 2001).

safest course is to obtain specific written consent rather than attempt to rely upon a statutory definition of what it means to do business in Indian Country. Consent would be fairly easy to get on reservations that have not been subjected to extensive checkerboarding as the result of the General Allotment Act of 1887.<sup>109</sup> Given the clear indication that Indian nations only have jurisdiction over non-Indians, if at all, on “tribal” land, there is the problem that if a business does not work on that kind of land, there is no jurisdiction. Tribes need a comprehensive approach. There is money to be made in Indian Country on various federal projects, initiatives funded by the tribe from its general fund monies and income, and even state projects. Many states are sensitive to tribal concerns when doing state projects within a reservation. One approach would be to conduct periodic business and contractor “pre-bids” where all businesses that are interested on doing business with a given tribe are invited to submit applications for approval to do business. That should include “border town” merchants who do business with tribes, with a discussion of their hiring and contracting activities. Applicants would be required to submit a written agreement that they will be bound by tribal law and by tribal adjudication fora if they want to do business with that tribe and conduct activities within the reservation. They would have to voluntarily submit to the tribe’s jurisdiction for any work done within the reservation, whether the work was done on trust land or not, and be bound by tribal labor law.<sup>110</sup> One of the obvious concerns in both

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<sup>109</sup> Checkerboarding refers to a pattern of land in various kinds of ownership, including trust land for the tribe, trust land for individual Indian allottees, and fee land, and sometimes additional mixes of federal U.S. Forest Service land, federal land maintained by the Bureau of Land Management, and state Aschool land” set aside under federal homesteading legislation. A map with different colors to show such ownership looks like a checkerboard.

<sup>110</sup> On the question of how tribal prevailing wage rates would apply, if a given tribe has a prevailing wage rate law, it would apply to non-Indian businesses through a consensual construction contract. Language which makes the tribal prevailing rate apply would have to be inserted in the AA.I.A. Model Construction Contract” many Indian housing programs use for

the Atkinson and Hicks decisions was the problem of case-by-case determinations, depending upon the place where something happened, the actor's ethnicity, or the occupation of the person who did it, and that can be resolved by a "choice of forum" and "choice of law" agreement, and such agreements are usually upheld by courts so long as they have a reasonable relation to the jurisdiction. There is such a reasonable relation so long as the agreement is restricted to the given reservation.<sup>111</sup> A great deal of creativity, and the opportunity to use social norm theory C namely getting consent by exchanging it for the opportunity to do business C provides good leverage.<sup>112</sup>

We have a perfect vehicle to approach Indian labor and employment legislation in the Native American Housing Assistance and Self-Determination Act Amendments of 1999. They make technical amendments to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), including an amendment of Section 104(b)(3).<sup>113</sup> Section 104(b)(1) requires Indian housing programs to comply with the Davis-Bacon Act<sup>114</sup> by paying laborers working on projects funded with federal monies the prevailing "corresponding wage rate" that is paid to classes of workers employed on projects "of a similar character in the locality." The technical amendment adding a new subsection (b)(4) provides:

Application of Tribal Laws. Paragraph (1) shall not apply to any contract or agreement for assistance, sale, or lease pursuant to this Act, if such contract or agreement is otherwise

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housing construction.

<sup>111</sup> There are special problems with off-reservation checkerboard areas, such as the Checkerboard Area of the Navajo Nation in northwest New Mexico, but they cannot be addressed here.

<sup>112</sup> Tribes should also explore the notion of voluntary agreements with bordertown merchants and their validity with EEOC and OFFCP.

<sup>113</sup> Codified at 25 U.S.C. Sec. 4114.

<sup>114</sup> Particularly the Act at 40 U.S.C. Sec. 276(a).

covered by one or more laws or regulations adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe.

What does this language mean?<sup>115</sup> Senator Ben Nighthorse Campbell, who proposed the amendments, submitted a committee report to Congress that explains this language, which was section 5 of the amendments:

This section modifies section 104(b)(1). Currently, the wage rate of all Indian housing assisted under the Act must meet the requirements of the Davis-Bacon Act. Under the Davis-Bacon Act, wage rates for laborers are determined by the Secretary of Labor in accordance with the corresponding wage rate paid to classes of laborers employed on projects of a similar character in the locality. Thus, tribes or their tribally designated housing entities must pay wages that are no less than those prevailing in the local area. The construction of tribal housing is often disadvantaged by the application of the Davis-Bacon provisions because HUD's wage surveys are generally based on considerably higher wages earned in larger metropolitan areas with a large population of unionized contractors.

S. 400 [the amendment bill] grants tribes and tribally designated housing entities a limited, threshold exemption to the application of the Davis-Bacon provisions but only if fewer than 12 units of housing are to be built. Other HUD programs include a similar exception when fewer than 12 housing units are developed. The following HUD programs, among other programs, contain the "under 12 units" exception: (1) Section 202 Supportive Housing for the Elderly Program, (2) Section 811 Supportive Housing for Persons with Disabilities Program, and (3) housing under the Home Investment Partnership Program. In addition, Housing Opportunities for Persons with AIDS Program has a complete exemption from Davis-Bacon requirements.<sup>116</sup> Application of Davis-Bacon increases the cost of construction and ultimately reduces the number of Indian homes that are built. On March 12, 1997, at a joint hearing before the Senate Committees on Indian Affairs and Banking, Housing and Urban Affairs, both Indian housing authorities and HUD officials stated that compliance with Davis-Bacon requires wage rates that are \$10.00 per hour higher than those of reservation wage rates.<sup>117</sup> This inflated wage rate increases the cost of labor on

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<sup>115</sup> See, David J. Stephenson, Jr. & James F. Wagenlander, *The Davis-Bacon Act Under Proposed Indian Housing Legislation*, 1 INDIAN HOUSING L.Q. 264 (1996) for some of the background to the Davis-Bacon problem.

<sup>116</sup> Note that this is language in the Senate report, and the bill, as passed, permits a tribal prevailing wage under tribal law rather than a 12 unit limit to waive the Davis-Bacon Act.

<sup>117</sup> What was the source of the "\$10 per hour" figure? The testimony of Christopher D. Boesen of the National American Indian Housing Council to the Senate Committee on Indian Affairs on February 23, 2000 references (at page 5) a AGAO Report." In March of 1997, the United States General Accounting Office made a report to the Subcommittee on VA, HUD, and Independent Agencies of the House Appropriations Committee entitled *NATIVE AMERICAN HOUSING*:

the reservation. The ultimate result is that fewer homes are built in Indian communities. In a community that is in dire need of increased and improved housing, compliance with Davis-Bacon requirements impedes the maximum capabilities of NAHASDA.<sup>118</sup>

How can tribes take advantage of the amendment? It means what it says: The Davis-Bacon “area prevailing wage” limitation does not apply if the given contract or agreement is “covered” by one or more tribal laws or regulations which requires the payment of not less than “prevailing wages,” “as determined by the Indian tribe.” That means that so long as there is a tribal law which establishes a method of determining what the “tribal prevailing wage” is, that will oust the federal prevailing wage rates. How can that be done? There are three methods in existing Indian labor codes: The Navajo Nation has an extensive statutory provision which permits the Office of Navajo Labor Relations to conduct its own surveys to establish the prevailing wages for an “area” within the Navajo Nation (although “area” is not defined).<sup>119</sup> One code authorizes the tribal TERO commission to adopt regulations to establish prevailing wages. Another simply sets a dollar figure for various occupations. It is a bad practice to set dollar amounts for things such as this in a statute, and such fixed rates could be attacked as not meeting the intent of the NAHASDA provision as being genuinely “prevailing.” It is appropriate to give the authority to a tribal agency in rule-making authority, because wage surveys can be difficult. Whether the prevailing wage

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INFORMATION ON HUD’S HOUSING PROGRAMS FOR NATIVE AMERICANS (March 1997). It references Davis-Bacon problems and the increase of construction costs at pages 11, 14, and 15, and it states that due to HUD’s wage surveys which include metropolitan areas, “the rate is about \$10.00 per hour higher than the wage rate prevailing in the local tribal area.” *Id.*, at 15. Judy A. England-Joseph of GAO provided the same information in testimony before the Senate Committees on Indian Affairs and Banking, Housing and Urban Affairs on March 12, 1997, “A Native American Housing: Challenges Facing HUD’s Indian Housing Program” (largely repeating the information in *Id.*).

<sup>118</sup> S. Rep. No. 106-145, 106th Cong., 1st Sess. 4 (1999) (footnotes omitted).

<sup>119</sup> 15 NNC Sec. 607 (ANavajo Prevailing Wage”) (1995).

provisions are put in a tribal statute or in a regulation authorized by a statute, there should be a reasonable and rational method of determining a “prevailing” wage. It is not sufficient to establish a minimum wage, as some of the tribal labor codes do.

The basic problem tribal officials will have with wage surveys is that they are difficult to conduct, and data is often hard to obtain. Given the jurisdictional difficulties recited above, voluntary compliance by area employers may be difficult to get. Indian housing officials can advise how hard it is to do salary comparability studies, which are required by HUD, but this is another area where cooperation can be of benefit. Employers are required to make quarterly wage reports to the United States Department of Labor and to state labor departments in many states. The reports indicate the amount of salary paid to employees for the quarter and the occupations of the employees. If the U.S. Labor Department and state labor departments share that data with tribes and their housing programs, it should be fairly easy to do accurate salary surveys. While tribes are not required to report salary data to the states, many do to get state unemployment compensation insurance for their employees, and tribes should have a database for their own employees. There are two difficulties with this: The first is that general tribal employees may not have the same occupations that we are interested in for housing projects, and the second is that if the survey gets salary information based upon pre-existing Davis-Bacon wage rates, there would be little difference in outcome (other than removing nearby urban areas from the data base).

The following language has been proposed for tribal code provisions to take advantage of the technical amendments’ new opportunity:

**PREVAILING WAGES** - Pursuant to section 104(b)(3) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. Sec. 4114(b)(3)), all architects, technical engineers, draftsmen, technicians, laborers and mechanics employed in the development and operation of this affordable housing project shall not be paid less than the prevailing wages in this locality as determined by the Tribe and adopted pursuant to Tribal

law or regulation.

EXCEPTIONS TO PREVAILING WAGES - the preceding paragraph requiring payment of prevailing wages does not apply to any unpaid volunteer or any other volunteer who receives a nominal fee, expenses, or reasonable benefits and who is not otherwise employed at any time in the construction of this affordable housing project.<sup>120</sup>

This too is a beginning. There will need to be constructive dialogue among federal and tribal officials and Indian housing organizations to address the practical and realistic method of approaching the prevailing wage issue.

Such discussions will be the beginning of something else, recognition of the fact that Indian nations need comprehensive labor codes as part of the legal infrastructure that is required for progressive Indian housing and economic development initiatives. In the past, we have concentrated on “bricks and mortar” issues in housing construction, but there is a larger picture. We need to progress further.

## CONCLUSION

This report builds upon a survey of fifteen tribal labor codes, and it provides both a general legal analysis of issues which must be considered before taking the third step of developing an outline of a “model” Indian nation labor code. Given two recent United States Supreme Court opinions, we now have a better understanding of the perimeters of regulatory and adjudicatory jurisdiction over non-Indians in general and state officials in particular. Those rulings do have the effect of invalidating many provisions in the fifteen codes that were reviewed.

More importantly, the lesson from these new legal developments is that we must discuss

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<sup>120</sup> Language provided by Kristy McCarthy, Coalition for Indian Housing and Development, on June 26, 2001. While this language is described as wording for a statute, in context, it looks more like construction contract language, referring to a tribal law or prevailing wage rate set under a statute or regulation.



new and innovative ways of obtaining cooperation and consent. There are many opportunities in the discussion and hints in the Hicks v. Nevada decision that there need to be new discussions of cooperative ventures with the states. We also need to take advantage of devolution and cooperation initiatives of the various federal agencies that work in Indian Country. While many may view the recent Supreme Court decisions as a setback, we must use them as new opportunities for Indian nation sovereignty. The economic development studies show that the effective exercise of sovereignty is a key to economic development, and we must utilize that sovereignty in comprehensive labor codes.

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# OUTLINE OF A “MODEL” INDIAN LABOR CODE

June 2001

## INTRODUCTION

This outline builds upon a survey of fifteen Indian nation labor codes and a separate legal analysis based upon best practices in the codes, recent developments in the law of Indian nation jurisdiction, and an amendment to the Native American Housing Assistance and Self-Determination Act of 1996 that should prompt new initiatives to develop Indian nation labor legislation.

There are several problems with an approach to a labor code outline which must be discussed before attempting an outline or code-drafting checklist. The first has to do with the reason the word “model” is put in quotation marks. There are, as of March 13, 2000, 556 Indian nations in the United States that are recognized by the federal government. They range in size from the Navajo Nation, which has more than 25,000 square miles of land, and it and the Cherokee Nation of Oklahoma have the largest numbers of enrolled members, to Indian nations which have small populations and very small land bases. It is obvious that a “one size fits all” approach will not work, although there can be a menu of subject areas for labor law which even small tribes should find useful for consideration. While it is fairly easy to identify basic labor standards to codify, the problem is enforcement. Can a given tribe afford or support an enforcement agency, or would it be sufficient to provide private remedies that could be enforced in a tribal court, special court, or some kind of administrative adjudicative body?

A second problem is that most models for labor legislation require a large and expensive institutional infrastructure. That is, there are labor departments to enforce the

standards in labor codes, and they require many kinds of personnel to carry out enforcement, monitoring, education, sanctioning, the adjudication of disputes, and other functions. It may be possible and desirable to have such an agency, but the problem is funding, and as we saw in the legal review done previously, there are taxation jurisdiction problems in Indian Country. Again, it may be possible to devise alternative enforcement mechanisms in labor law that we have seen in some tribal labor codes, such as the ability of an aggrieved employee to file a claim directly in tribal court.

It is difficult to evaluate state labor codes, and it is unfortunate that we do not have a labor code model developed by a professional association or academic institution. Most state codes are the product of that state's history and industry. There have been controversies and disputes on issues such as labor unions, wage levels, mandatory arbitration, just cause for discharge (including its definition, burdens of proof, after-acquired evidence, and other problems) which have been resolved with employers or employees having the upper hand, or some form of compromise (including compromises that result in unusual labor provisions). Therefore, any code drafter must take great care when using any state code as a drafting model to be certain that the public policy and cultural climate of Indian nations are taken into account.

Research shows that there are no "model" labor codes in the United States. While one would assume that the International Labour Organization in Geneva, Switzerland could offer useful guidance for labor legislation, its conventions and standards tend to be too broad for practical use. While there is "model" legislation for countries such as Russia and Singapore, it is not likely to be useful for our purposes.

After reviewing tribal and state legislation it is obvious that framing definitions is important. What is an “employer”? An “employee”? Who is an “independent contractor” for purposes of the application of labor code provisions? Some of the tribal codes addressed these problems and others. There is a great deal of labor litigation in the United States, and new developments in definitions will be an important part of the task of drafting model legislation.

One of the challenges is identifying the basic standards and “core areas” for a labor code. What employment problems are there in Indian Country which must be addressed? What issues are unique to Indian Country? Several of the tribal labor codes have special provisions which require employers to give reasonable accommodation to Indian religious and cultural beliefs and practices, and that is a useful exercise. Should, for example, an employer be required to carry health insurance that covers the fees of medicine people and ceremonies? That is done in the Navajo Nation. Indian nations tend to recognize and advocate group rights, and it is likely that Indian common law supports contemporary international economic human rights, such as the provisions in Article 23 of the Universal Declaration of Human Rights that there is a right to have a job at a living wage and just conditions of work; Article 25, which recognizes the right to wellbeing of a person and their family, including food, housing and medical care and necessary social services; and Article 26, which recognizes the right to an education. What are the core areas, for example, which flow from Article 23?

Finally, as can be seen from the review of the tribal labor codes and contemporary Indian affairs law, any code for Indian Country must first address the jurisdictional foundations, including the kinds of activities by non-Indian employers that would have

“some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” as in the *Montana* Test? As noted previously, any code drafter will have to consider the implications of federal statutes of “general application,” federal preemption, conflicts with state policy where nonmembers are impacted, and other issues. Any drafter should be mindful that the legal evaluation previously done was based upon the inherent powers of Indian nations, and the Supreme Court reminded us that Indian nations also get powers from their treaties and from federal legislation. Both a given Indian nation's treaty or treaties should be studied, and federal legislation in the area must be studied as well.

With these considerations in mind, the following outline will address: (1) Issues pertaining to Indian nation powers and jurisdiction for a code, (2) definition issues, (3) regulatory infrastructure considerations, core or basic issues in employment law, and (4) other possible areas of consideration. The outline is intended to be a checklist for consideration. While parts of it may be repetitious, that is necessary to make certain that all subjects are included.

## I.

### INDIAN LAW ISSUES

#### A. POWER AND AUTHORITY

1. Identification of the relevant Indian treaty and its provisions
  - a. Treaty exclusion powers
  - b. Rights of others to enter and remain, or not
  - c. Powers to punish and relationships with United States
  - d. Other treaty provisions which are unique to the tribe and which may modify principles of general Indian law

2. Identification of relevant federal legislation
  - a. Legislation that delegates or recognizes Indian nation power and authority
  - b. Legislation that may give a federal agency the discretion to support tribal labor legislation
  - c. Legislation that may permit “baby statutes,” which are local statutes that meet or exceed federal standards
3. Identification of tribal constitution and bylaws powers
4. Identification of powers in a tribal business corporation under the Indian Reorganization Act
5. Review of general Indian law principles regarding the inherent powers of Indian tribes
6. Detailed examination and statement of the tribe’s situation (e.g. economy, unemployment, age cohorts, poverty, etc.) and a statement of labor issues which have a direct effect upon the tribe’s political integrity, economic security, and the health and welfare of the tribe *and* reservation residents
7. The Indian Civil Rights act and tribal Bills of Rights, and the need to have a statement of basic rights

## B. JURISDICTION

1. Statement of jurisdiction based upon the treaty
2. Statement of jurisdiction based upon federal delegation or discretion
3. Who is an “Indian”?
4. Who is a “member”?
5. What is the tribal territorial jurisdiction?
  - a. Treaty definition

- b. Definition in statute or executive order that established the reservation
  - c. Are there off-reservation “dependent Indian communities,” and how are they defined?
- 6. What are the situations to obtain the consent of non-Indians?
  - a. Entry and residence permit
  - b. Commercial dealings with the tribe
- 7. The definition and rights of Indian entities and businesses

C. INDIAN PREFERENCES

- 1. Definitions
  - a. “Indian”
  - b. “Employer” and “covered entity”
  - c. “On or near the Reservation”
  - d. “Indian business or entity”
  - e. “TERO”
  - f. The agency and director
  - g. The commission or board
  - h. “Contract and subcontract”
- 2. Tribal employment rights office
  - a. Establishment
  - b. Director
  - c. Functions, powers and duties
  - d. Implementation of program
  - e. Processing complaints

- f. Annual reports
  - g. Duties of other tribal and federal programs
  - h. Relationship with other programs and agreements (including state anti-discrimination agencies)
3. Tribal employment rights review board or commission
- a. Establishment
  - b. Qualifications of members
  - c. Compensation
  - d. Jurisdiction
  - e. Sanctions
  - f. Hearing procedures
  - g. Decisions
  - h. Appeals
  - i. Independence
4. Employment preference
- a. Indian employment preference
  - b. Index of Indian applicants or hiring hall
  - c. Hiring
  - d. Layoffs
  - e. Promotions
  - f. Summer students
  - g. Collective bargaining agreements and unions
  - h. Individual complaints
  - i. Compliance and hearing procedures



- j. Prohibition of retaliation
5. Contracting and subcontracting preference
- a. Subcontracting preference
  - b. Scope of preference
  - c. Technical qualification and reasonable price
  - d. Submission of contracting and subcontracting plan
  - e. Operation of the contract or subcontract
  - f. Replacement of non-Indian firms by certified firms after project begins
  - g. Reports and monitoring
  - h. Individual complaints
  - i. Compliance and hearing procedures
  - j. Criteria for Indian contract preference certification
    - 1) Ownership
    - 2) Management control
    - 3) Integrity of firm structure
    - 4) Residence
  - k. Applications for certification
  - l. Certification determinations
  - m. Probationary certification
  - n. Final certification
  - o. Withdrawal of certification
  - p. Firms previously certified

- q. Annual and other reports
  - r. List of certified entities
  - s. Retaliation forbidden
6. Voluntary Indian preference
- a. Voluntary preference defined
  - b. Voluntary Indian preference policy
  - c. Employment
  - d. Reporting
  - e. Publicity
  - f. Review of TERO actions

D. LABOR STANDARDS

- 1. Description of the agency or agencies who will enforce the labor standards in the code
- 2. Description of the labor standard areas
- 3. Application of the labor standards
  - a. Application to members
  - b. Application to non-members
    - 1) Indians
    - 2) Non-Indians

II.

DEFINITION ISSUES

Define:

- A. "Employer"

- B. “Employee”
- C. “Independent Contractor”
- D. “Agent” or “representative”
- E. Business entities
  - 1. Corporation
  - 2. Partnership
  - 3. Business trust
  - 4. Entity
  - 5. Individual
  - 6. Tribal agencies, programs, enterprises and corporations
  - 7. Non-profit and charitable organizations
- F. Indian preference
- G. Indian business or entity
- H. “On or near reservation”
- I. "Prevailing minimum wage" and the method to determine that wage
- I. Subjects of the labor code
- J. To whom the code will apply
- K. Indian-specific issues (listed in I)

### III.

#### REGULATORY INFRASTRUCTURE ISSUES

- A. Define the agency or agencies to be created
- B. Describe the purposes of the agency or agencies

- C. Define the subject matter jurisdiction of the agency or agencies
- D. Define the power and authority of the agencies
  - 1. Rule-making authority and procedure
  - 2. Power to investigate
  - 3. Power to enforce (and procedural issues)
  - 4. Power to impose sanctions
  - 5. Fact finding
  - 6. Assessment of required remedial action
  - 7. Prevention of violations in the future
  - 8. Education
  - 9. Training
  - 10. Sanctions
    - a. Denial of privileges
    - b. Revocation of contracts, permits, or licenses
    - c. Actual and “make whole” damages
    - d. Civil penalties
    - e. Civil punitive damages
    - f. Liquidated damage provisions
    - g. Compliance and actions which must be taken to comply
    - h. Equitable and court relief
- D. Describe the agency personnel and their power and authority
- E. Describe a separate quasi-judicial hearing body
  - 1. Membership, tenure and removal

2. Independence and freedom from political control
3. General power, authority and jurisdiction
4. Procedural due process requirements
  - a. Notice
  - b. Opportunity to be heard
  - c. Fair hearings
  - d. Impartiality of the body
  - e. Right to counsel of one's own choice (paid by the party)
  - f. Compulsory attendance of witnesses and production of evidence
  - g. Confrontation and cross-examination
  - h. No prior knowledge of the facts by the hearing body and no communication with the enforcement agency or employees
  - i. Issuance, deadlines and contents of decision

#### F. JUDICIAL REVIEW

1. Designation of judicial appellate body (trial, appeals court or both)
2. Standard of review
  - a. On the record
  - b. Arbitrary, capricious and contrary to law

#### G. SUPPLEMENTARY AND EQUITABLE REMEDIES

1. Temporary, preliminary and permanent injunctions
2. Writs of mandamus, prohibition, certiorari, and assistance
3. Special provisions for the protection of civil rights

## H. ALTERNATIVES TO AGENCY ACTION

1. Standards create a private right of action
2. Filing in court or administrative agency
3. Attorney fees
4. Statutory damages (e.g. treble) and penalties
5. Civil punitive damages
6. Equitable relief

## IV.

### CORE ISSUES

#### A. BASIC RIGHTS

1. Right to employment
2. Right to education and training
3. Right to fair treatment in employment
4. Right to fair compensation
5. Right to fair conditions of employment
  - a. Freedom from discrimination
  - b. Freedom from harassment, unfair treatment and bullying
  - c. Reasonable leave
  - d. Reasonable sick time and insurance coverage
  - e. Religious and cultural accommodation
  - f. Freedom of association
  - g. Right to grievance procedures

#### B. THE EMPLOYER-EMPLOYEE RELATIONSHIP

1. Formation of the employer-employee relationship
2. Definition of (or rejection of) employment at will
3. Basic conditions of employment
  - a. Workplace safety and freedom from abuse
  - b. Leave (vacation, illness, family emergency, pregnancy, military service, voting, education, holiday, religious, cultural, and special leave conditions, such as administrative leave)
  - c. Benefits (health insurance, life insurance, retirement program, education, bonuses and incentives)
4. Grounds for discipline
5. Definition of “just cause” for discipline or discharge and the burden of proof
6. Due process or equitable due process rights
7. Grievance procedures and appeals

#### C. COMPENSATION

1. Minimum wage
2. The prevailing minimum wage
  - a. Methodology for determining the wage
  - b. Rule-making provisions if that approach is used
  - c. Definition and application of the prevailing wage to defined employers and contractors
3. Payment of wages
  - a. Periodic pay (i.e. weekly, biweekly, monthly) and time following the pay period wages must be paid
  - b. Separation pay (i.e. when final pay must be paid out)

c. Payment of accrued leave or sick time on termination

d. Penalties

1) Double or treble damages based on pay that is due

2) Criminal penalties

3) Civil penalties

4) Enforcement (agency or court)

4. Assignment of wages

5. Garnishment (child support, etc.)

6. Voluntary deductions

#### D. PRIVILEGES AND PERQUISITES

1. Gratuities and tips

2. Bonds and photographs

3. Contracts (authority)

4. Purchases

5. Uniforms

6. Special privileges

#### E. WORKING HOURS

1. Exempt employees

2. Non-exempt employees

3. Overtime pay

4. Compensatory time

5. Voluntariness of overtime

6. Limitations on overtime (e.g. budget)



F. PRIVILEGES AND IMMUNITIES

1. Contracts against public policy
2. Misrepresentation in the solicitation of employees
3. Contractors
4. Alcohol and drug policies and rehabilitation
5. Employee assistance programs
6. Literacy assistance
7. Reemployment privileges
8. Political and social affiliations
9. Suits
10. Reasonable accommodation of disabilities, languages and religious and cultural considerations
11. Freedom from discrimination

G. EMPLOYEES

1. Wages, hours and working privileges
2. Occupational privileges and restrictions
3. Working hours
4. Minors

H. LICENSING

1. Entry or residence permit
2. Business licenses
3. Employer license
4. Taxes and fees

I. UNEMPLOYMENT RELIEF

J. HEALTH

1. Sanitary standards
2. General workplace safety standards

K. EMPLOYMENT RELATIONS

1. The contract of employment
2. Obligations of the employer
3. Obligations of the employee
4. Employee fiduciary duties
5. Employee inventions and ideas
6. Investigations of employees

L. APPRENTICESHIP

M. STUDENT EMPLOYMENT

N. CHILD LABOR STANDARDS

IV.

OTHER AREAS OF CONSIDERATION

A. WORKER'S COMPENSATION

B. UNIONS AND COLLECTIVE BARGAINING

1. Definition of collective bargaining
2. The right to bargain
3. Good faith
4. Organizing
5. Certification of union

6. Collective bargaining agreements
7. Decertification of union
8. Management and employee definition
9. Strikes and employee action
10. Mediation and arbitration
11. Judicial review and remedies

C. OCCUPATIONAL HEALTH AND SAFETY

D. TRIBAL SPECIFIC INDUSTRIES AND EMPLOYMENT

1. Gas and oil
2. Fishing
3. Forestry
4. Casinos
5. Livestock
6. Arts and crafts
7. Traditional economies

E. IMPLEMENTATION OF FEDERAL PROGRAMS

1. Housing
2. Labor
3. Health and safety
4. Environment
5. Economic development

F. ALTERNATIVE DISPUTE RESOLUTION, MEDIATION, AND TRADITIONAL INDIAN LAW

G. ADMINISTRATIVE PROCEDURES ACTS

## H. CIVIL RIGHTS REMEDIES

1. Conventional models
2. Traditional remedies
3. Injunctive relief and sovereign immunity

## CONCLUSION

This listing of an outline of labor law subjects is designed to prompt thinking and discussion about specific employment and labor standards and the means to enforce them. Indian nations are already familiar with personnel policies, so this outline will appear to be familiar. The basic issue is whether Indian nations wish to turn standards usually found in personnel policies into general legislation. The trick or the key to that will be jurisdiction over non-members, and a great deal of it will depend upon both the composition of the reservation in terms of land tenure, and as we have seen, consent and submission of nonmembers to the tribe's jurisdiction. Many of the new jurisdictional changes are very recent, and it will take time for Indian Country to understand, consider the implications of the new rules, and adapt to them.

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**Part # 3 INDIAN NATION LABOR CODES:  
BEST PRACTICES**

**A Data Base of Summaries of  
Selected Tribal Labor Codes**

**July 2001**

INTRODUCTION

The Davis-Bacon Act, at 40 U.S.C. Sec. 276(a) (1996), provides that laborers working on projects funded with federal monies must pay the prevailing “corresponding wage rate” that is paid to classes of workers employed on projects “of a similar character in the locality.” That requirement is incorporated in Section 104(b)(1) of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA”) (codified at 25 U.S.C. Sec. 4114). The wages “prevailing in the locality” are determined by the Secretary of Labor. As Congress recognized when it recently adopted a bill to make technical corrections to NAHASDA, when the Secretary identifies the prevailing wages in a given “locality,” that drives up the cost of housing construction because wage rates in the “local area” can include “considerably higher wages earned in larger metropolitan areas with a large population of unionized contractors” in the prevailing wage rates. Senate Report No. 106-145. Section 104(b)(1) is now modified by a new Section 104(b)(3), which provides:

Application of Tribal Laws. Paragraph (1) shall not apply to any contract or agreement for assistance, sale, or lease pursuant to this Act, if such contract or agreement is otherwise covered by one or more laws or regulations adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe.

This means that Indian tribes have the opportunity to adopt their own prevailing wage standards for NAHASDA projects. They can do so through a tribal “law,” including statutes, ordinances and council resolutions, or through “regulations” where a tribal administrative agency has the statutory authority to adopt regulations or rules. That strengthens tribal sovereignty, because the amendment recognizes that often, Indian reservations and other parts of Indian Country are frequently lumped together with areas outside Indian country in an inappropriate way, and it acknowledges the inherent power of Indian nations to exercise their sovereignty by enacting labor laws. The amendment offers a realistic approach to the cost of housing construction in Indian Country.

This amendment prompts Indian nation leaders to think about the problem of “prevailing wages.” How will they be set? The United States Department of Labor compiles reports of the amount of wages paid for different occupations from employer records. How can an Indian nation perform that task? The various states have their own labor departments, with the power to regulate labor and require employer compliance with labor laws; so Indian nations can do the same exercising their sovereignty. The change to NAHASDA prompts us to think about Indian nation labor law and possible new statutes to regulate labor practices in Indian Country. How do we go about doing that? We can take a “micro” approach of simply looking at some existing state labor codes and federal worker protection statutes, or we can take a “macro” or big approach of surveying existing Indian nation labor laws to establish the best existing labor law practices in Indian Country.

This study will identify, analyze, and annotate existing tribal labor codes to see the best practices being used in Indian Country. That will give us guidance and possible approaches to developing model or sample labor codes for the future. Indian nation labor codes began with the clarification of Indian preference in employment laws. A federal preference for employing Indians

dates from at least 1834, and it was continued in Section 12 of the Indian Reorganization Act of 1934. The United States Supreme Court upheld the constitutionality of Indian preference hiring in the case of *Morton v. Mancari*, 417 U.S. 535 (1974). When Congress enacted the Indian Self-Determination Act of 1975, to give grants and contracts to Indian nations to carry out federal functions, Indian preference then applied to tribal employment. Many Indian nations took advantage of that by enacting “Tribal Employment Rights Ordinances” and creating “Tribal Employment Rights Offices.” Both are popularly known as “TEROs.” Early versions of such laws were usually limited, giving hiring preference to tribal members and providing for some enforcement of preference rights. As the laws passed by various Indian nation councils evolved, however, we began to see new TERO codes which provided for general employment rights and grievance or complaint mechanisms. In turn, some Indian nations recognized the possibility that they could enact more comprehensive labor codes and establish administrative labor agencies. Those laws are the basis of this study, which collects and evaluates the various Indian country labor laws to analyze them to discover what the “best practices” in Indian Country happen to be.

## IDENTIFICATION OF CODES

The labor laws of the following Indian nations have been identified and collected (in alphabetical order):

1. Agua Caliente Band of Cahuilla Indians (California)
2. Cherokee Nation (Oklahoma)
3. Confederated Tribes of the Colville Reservation (Washington)
4. Fort Peck Assiniboine and Sioux Tribes Reservation (Montana)
5. Gila River Indian Community (Arizona)
6. Hoopa Valley Tribe (California)
7. Minnesota Chippewa Tribe of Leech Lake Reservation (Minnesota)
8. Lummi Nation (Washington)
9. The Navajo Nation (Arizona-New Mexico-Utah)
10. Oglala Sioux Tribe of the Pine Ridge Reservation (South Dakota)
11. Stockbridge-Munsee Community of Mohican Indians (Wisconsin)
12. Central Council, Tlingit & Haida Indian Tribes of Alaska
13. Turtle Mountain Band of Chippewa Indians (North Dakota)
14. Confederated Tribes of the Umatilla Reservation (Washington)
15. White Mountain Apache Tribe of the Fort Apache Reservation (Arizona)

While a word search of the Internet shows that there are other Indian nations which have employment and labor laws, this is a random sampling of available codes. It is a sufficient sample for analysis, comparison, and an identification of best practices in Indian nation labor laws.

## ANALYSIS & ANNOTATION

The analysis and annotations of these codes (in alphabetical order) is as follows:



## 1. Agua Caliente Band of Cahuilla Indians Tribal Labor Relations Ordinance

This law was enacted on September 14, 1999 to address a controversy in California about the rights of workers in new California casinos. It appears to be a general and model labor relations code for California's gaming tribes as a product of California's tribal-state gaming compact. There are thirteen sections, which address:

### 1. Applicability

The code applies to "any tribe" which employs 250 or more persons in a tribal casino or "related facility," and such tribes are required to adopt this particular "Tribal Labor Relations Ordinance (TLRO or Ordinance)." "Tribal casino" is defined as a Class III gaming facility under federal Indian gaming law. "A 'related facility' is one for which the only significant purpose is to facilitate patronage of the class III gaming operations." Tribes which did not operate a casino as of September 10, 1999, but which later open a casino, can delay adopting the ordinance until one year after the number of employees in a casino or related facility exceeds 250. Labor unions of the power to ask a tribal gaming commission to certify the number of casino-related employees it has, and either a union or the tribe can dispute the certification before the "Tribal Gaming Commission" or the "Tribal Labor Panel."

This is an example of a statewide approach to labor law for gaming tribes. This is a negotiated law which was the product of a great deal of controversy in California. The ordinance does not indicate whether the provisions of this model are fixed, or whether this is the minimum required by the compact. California Indian nations have the same inherent powers as the other Indian nations of the United States to regulate their own affairs, and all powers vested by a given tribal constitution and bylaws, with concurrent jurisdiction with the State of California.

### 2. Definition of employees

The ordinance applies to "any person" (also known as an "Eligible Employee") who is employed in a casino or related facility for Class III gaming. However, supervisors are exempted. A "supervisor" is a person who has hire-fire and disciplinary power, whose authority is not "merely routine or clerical," but requires the use of independent judgment. Covered employees also include employees of the Tribal Gaming Commission, security and surveillance department employees (excluding technical repair or equipment employees), employees who handle cash operations as a "cage" employee or money counter, and [card] dealers. The ordinance excludes managers and supervisory personnel while assuring that all gaming-related positions are covered.

### 3. Non-interference with regulatory or security activities

The law specifically prohibits interference with the Tribal Gaming Commission's duty to "regulate the gaming operation in accordance with the Tribe's National Indian Gaming Commission-approved gaming ordinance." The law cannot be read to interfere with casino surveillance and security systems or other internal control operations to protect the integrity of gaming operations. The Tribal Gaming Commission is excluded from the definition of "tribe" and its agents.

This provision is designed to make certain that security operations are independent of the law and that internal controls are not regulated by it. It recognizes the importance of the integrity of the gaming operation, so it is free from control.

4. Employee concerted activity

Employees who are covered by the law have the right to organize, form or join employee organizations and engage in collective bargaining. Importantly, employees also have the right to refrain from organizing (union) activities.

5. Unfair labor practices

This section puts limitations upon the tribe in its labor practices, and it is an unfair labor practice for the tribe or its agents:

- To interfere with, restrain, or coerce employees regarding their rights;
- To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to one, but that does not prohibit a union security or dues check-off;
- To discharge or discriminate against an employee because he or she files charge or gives testimony under the Ordinance;
- To refuse to bargain collectively with the representatives (i.e. union officials) of employees.

6. Union unfair labor practices

The Ordinance also prohibits labor organizations (unions) or their agents from:

- Interfering with, restraining or coercing employees in the exercise of their rights under the Ordinance;
- Engaging in, inducing or encouraging other persons to engage in a strike or a boycott or refusal to transport items or perform services, or threatening, coercing, or restraining any person. This provision does not apply when there is a “collective bargaining impasse.” It is designed to prohibit unions from urging employees who provide goods or services to the casinos to strike or refuse to work as leverage against the casino tribe;
- If one labor organization has been certified to represent employees, another cannot force or require the tribe to recognize or bargain with it;
- If a union is the collective bargaining representative of covered employees, it cannot refused to bargain collective with the tribe or an employer (if someone other than the tribe operates gaming);

- Attempting to influence the outcome of a “tribal governmental election,” but that prohibition does not apply to tribal members.

7. Free speech

Both the tribe and a given union have the right to free speech, and no form of speech in any form can be limited so long as it “contains no threat of reprisal or force or promise of benefit.”

8. Access to employees

Unions have the right to access to employees to organize them. However, such activities cannot interfere with the patronage of the casino or a related facility (i.e. the customers), and it cannot be done during employee work time. It must be done on employee non-work time in non-work areas, such as break rooms or locker rooms that are not open to the public. If there are licensing requirements for others with access to the casino or a related facility, the tribe can require union officials to become licensed, so long as the licensing provisions are not unreasonable, discriminatory, or designed to impede access for organizing. The tribe can designate other areas for access, such as parking lots and non-casino facilities on tribal lands.

To fine-tune what it means to interfere with normal work routines, union activities will not be permitted if the compromise security and surveillance systems in the casino and the reservation, security access limitations, internal security controls, or other systems to assure the integrity of gaming operations, or safety to persons and property.

If 30% of employees express an “interest” to the Tribal Labor Panel, a list of eligible employees and their last known address must be provided. The tribe can voluntarily produce an eligibility list at an earlier point in a union organizing campaign.

The tribe must “facilitate” the dissemination of union information to employees by allowing posters, leaflets and other written materials to be posted in non-public employee break areas where other employee announcements are posted. The posting is to be done by employees who want to post the materials.

9. Indian preference

Indian preference to “members of any federally recognized Indian tribe” is permitted, and there is no restriction on the obligation to follow tribal law, personnel policies, or tribal customs and traditions on Indian preference. However, if there is a conflict of such provisions and the Ordinance, tribal law, ordinances, and its customs and traditions “shall govern.”

10. Secret ballot elections

If 30% of eligible employees sign “authorized cards,” a secret ballot election must be held in thirty days after presentation of the cards to an elections officer. The election officer, who must be a member of the Tribal Labor Panel must hold the election, and he or

she also decides “all questions” on representation of the tribe or a labor organization. When a labor organization notifies the tribe of the intention to present authorization cards, an election officer must be chosen and preside.

An election officer must certify the labor organization as the exclusive bargaining represent of a unit of employees if it receives a majority of employee votes by secret ballot, if the election was conducted fairly. The election officer has the power to order a re-run election where there is employer or union misconduct. If the election officer determines that unfair labor practices by the tribe interfered with the election process, and the union can show that it had the support of a majority of the employees, the election officer must certify the labor organization. When an election officer makes an election decision, the tribe or the union can appeal that decision to a three-member panel of the Tribal Labor Panel.

11. Collective bargaining impasse

When a union is recognized, the tribe and the union must negotiate in good faith for a collective bargaining agreement. If negotiations reach an impasse, and the problem is not resolved in “tribal forum procedures” (set out in a later section) within sixty working days or an agreed time, the union has the right to strike. However, no strike-related picketing can be conducted on Indian lands.

12. De-certification of bargaining agent

If 30% or more of eligible employees sign a petition for de-certification of a certified union, then a secret ballot election must be held in 30 days from presentation of the petition. The election officer conducts the election, and there are the same kinds of fairness provisions as for organizing elections. If there is no collective bargaining agreement in place, a de-certification election cannot be held until one year after the initial certification of the union. Where there is a collective bargaining agreement, a de-certification petition cannot be filed more than 90 days, and no less than 60 days, after the expiration of a collective bargaining agreement. A petition can be filed at any time after a collective bargaining agreement has expired.

13. Dispute resolution mechanism

Disputes must be resolved using the dispute resolution mechanisms in this section, except for collective bargaining agreement negotiation impasses, which go through the first level. The first level of binding dispute resolution procedures for organizing, elections, unfair labor practices, and the discharge of eligible employees consists of an appeal to a “designated tribal forum,” such as a tribal council, business committee, or grievance board. There are time limits:

- Organizing, election procedures and unfair labor practices before a union is certified must be resolved within 30 working days;
- After a union is certified, and the dispute relates to an impasse during negotiations, the tribal forum must resolve the matter within 60 working days;

There is a second level of binding dispute resolution, namely a “Tribal Labor Panel,” which is made up of ten arbitrators “appointed by mutual selection of the parties.” That panel serves all tribes that adopt the Ordinance. Each member of the panel must have “relevant experience” in federal labor law or federal Indian law, with preference to those who have experience in both. When a dispute goes to the panel, one arbitrator from the panel can render a binding decision. If there is an objection, the dispute will be decided by a three-member panel. Where there is one arbitrator, five Tribal Labor Panel names are presented to the parties, and each party can strike up to two names. Who will strike the first name is decided by a coin toss. The arbitrator must “generally follow” American Arbitration Association labor dispute resolution procedural rules. Arbitrators must render written decisions.

There is a third level of binding dispute resolution, namely a motion to compel arbitration or to confirm an arbitration award in Tribal Court. That decision “may be appealed to federal court.” If the tribal court does not make a decision in 90 days, or if there is no tribal court, then the matter may go directly into federal court. If it declines jurisdiction, the tribe agrees to a limited waiver of sovereign immunity “for the sole purpose of compelling arbitration or confirming an arbitration award” ... “in the appropriate state superior court.”

While this example of a labor law is limited to collective bargaining in gaming tribes, it is an important reference for gaming tribes across the country. Collective bargaining agreements are usually lengthy documents, which address things such as employee compensation, working conditions, and employee grievances C the stuff of many labor codes. This gives an opportunity for the tribe to deal with its employees on basic employee issues for the term of the agreement, and to take a fresh look at labor issues at the expiration of a collective bargaining agreement.

The overall agreement is realistic because it recognizes Indian preference in employment. Although the preference is for Indians in general and not for tribal members only, that may be realistic in California, because there are many small bands and rancherias. The ordinance assumes that non-Indian employees will have the right to organize and collectively bargain over working conditions. The ordinance also gives deference to tribal law, including customary law (although there may be disputes over how it is determined by the tribe), and gives primary jurisdiction to a tribal court, before federal or state courts. If a federal court declines jurisdiction (which is likely in most cases because federal subject matter jurisdiction C the kinds of cases a federal court has the power to hear C is very limited), then there is a limited waiver of tribal sovereign immunity. It is strictly limited to requiring binding arbitration, enforcing an arbitration decision, or challenging a decision as violating the Ordinance. It appears, overall, that the tribe would only subject itself to non-monetary relief, having to do with organizing, unfair labor practices, and elections. There might be problems with sovereign immunity, depending upon the nature of proposed collective bargaining agreements and remedies offered under them. Overall, this ordinance is a sample of addressing the content of labor standards and dispute resolution methods through collective bargaining.

## 2. Cherokee Nation Tribal Labor Relations Ordinance

There are only a few Indian nations in the United States (e.g. the Cherokee Nation, the Navajo Nation, and the Turtle Mountain Band of Chippewa Indians) which have commercially-published bound statutes. The Cherokee Nation Code is published by West Publishing Company of Saint Paul, Minnesota. The “Cherokee Nation Employment Rights Ordinance” has six chapters in Title 40 of the Code. The chapters address these subjects:

### Chapter 1: General Provisions

- Title
- Purpose: The title requires the fair employment of Indians and prohibits discrimination against Indians “in the employment practices of employers who are doing business with the Cherokee Nation on tribal lands.
- Definitions. The relevant definitions for our analysis include:
  - There is a “Committee,” meaning the “Cherokee Nation Employment Rights Committee,” which is the members of the Employment Committee of the Cherokee Tribal Council.
    - There is a “TERO” or Tribal Employment Rights Office.
    - One of the important definition elements of any labor code is the definition of “employer,” and that is “any person, company, contractor, subcontractor or other entity located or engaged in work with the Cherokee Nation, employing two or more persons.” Federal, state and county government agencies are excluded from the definition, but “employer” includes “agencies, contractors, and subcontractors of all other agencies.”
    - The term “engaged in work” to determine who is an employer means that “if during any portion of a business enterprise or specific project, contract or subcontract, he or any of his employees spends a majority of time performing work under contract with the Cherokee Nation of Oklahoma and the work is performed on tribal lands.”
    - An “Indian” is “any person recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.” Note: Most federal statues require that an “Indian” be an enrolled tribal member. It is not clear what this definition means.
    - An “Indian-owned business” is any business entity which is “at least” 51% owned by Indians. The definition has detailed restrictions on proof of ownership, control, business value, and profit, and the firm must be “under significant Indian management

and control.” *Comment: The detailed restrictions on Indian control and management are an excellent example of provisions to prevent frauds and misuses of Indian preference in contracting law.*

- An employer is “located on the Cherokee Nation” if, during any portion of a business enterprise or specific project, contract, or subcontract, that employer “maintains a temporary or permanent office or facility on tribal lands.” *Comment: The Cherokee Nation is unique in its land tenure. What happens if an employer operates on tribal lands but refuses to maintain an office or facility on tribal lands?*
- “Tribal lands” includes all land held in trust for the Cherokee Nation by the United States or land owned by the Nation in fee simple.

## Chapter 2: Cherokee Nation Employment Rights Committee

- This chapter addresses:
  - The establishment of a Cherokee Nation Employment Rights Committee
  - The general duty to “administer the employment rights program of the Cherokee nation...”
  - General powers: The committee can-
  - Operate under the Act and adopt rules and regulations “governing pertinent activities of TERO;”
  - Obtain federal, state, or other funding to supplement Council appropriations;
  - Establish numerical hiring goals and timetables specifying the minimum number of Indians an employer must hire by craft or skill level;
  - Require employers to establish or participate in job training to increase the pool of Indians eligible for employment;
  - Establish and administer a job bank and require employers to use it;
  - Prohibit employers from using job qualifications or requirements that “may bar” Indians from employment unless the criteria “are required by business necessity.” The committee can adopt EEOC [the U.S. Equal Employment Opportunity Commission] guidelines or adopt other requirements to eliminate employment barriers which are “unique to Indians in Indian Country;”

- Enter into agreements with unions;
- Require employers to give preference to tribal and other Indian-owned businesses;
- Establish employment-counseling programs;
- Hold hearings;
- Require employers to submit reports and take “all actions deemed necessary by the commission for the fair and vigorous implementation of this chapter;”
- Make cooperative agreements with federal employment rights agencies; and
- Take other actions necessary to achieve the purposes of the labor title.
- Rules, regulations and guidelines: The committee is required to adopt such documents, with the approval of the Council, “with all reasonable speed” upon formation.
- All funds the committee collects from employer fees or other sources are tribal funds.

### Chapter 3: Indian Employment Rights, Requirements and Programs Generally

- Indian preference generally: Employers must give preference to Indians in hiring, promotion, training, and all other aspects of employment, and comply with the labor code and all rules and regulations.
- Preference in contracting and subcontracting: There is preference in the award of contracts and subcontracts to tribally-owned and Indian-owned businesses, and the TERO staff will maintain a list of such businesses to give to employers.
- There is preference in promotions “in accordance with required ratios.”  
*Note: This most likely refers to past federal programs, now largely abandoned, which gave employers data on minority compositions of workforces.*
- There is a preference for students for summer student employment, and employers “shall make every effort” to promote after-school, summer and



vacation employment for Indian students.

- Numerical goals: The TERO staff can establish a minimum number of Indians for an employer work force, and set numerical goals for each craft, skill, mob classification, etc. used by any employer. The goals must be expressed in terms of man-hours in the given job classification. *Comment: Using man hours prevents the abuse of hiring people for part-time employment or very limited employment.*
- The TERO staff must review goals annually, and employers must give monthly reports indicating the number of Indians in the work force, compliance with goals, all persons hired and fired during the month, the job positions involved, and other information required by TERO.
- Employers can be required to participate in training programs for Indians, with a ratio of Indian trainees to be set by TERO.
- Employers are prohibited from using job criteria or personnel requirements which “bar” Indians from employment “unless such criteria or requirements are required by business necessity. *Note: The obvious source of this provision is Title VII of the Civil Rights Act of 1964. This links the tribe’s prohibition to federal law, and the current state of federal civil rights law is not healthy. Should the statute prohibit practices which “deter” Indians from employment rather than bar them? Also note that disparate impact discrimination claims do not do well under the current state of federal civil rights law.*
- Where there is a reduction in force or layoffs, employers must still maintain the “required ratio of Indian employees.”
- Indian preference requirements are also binding on contractors and subcontractors of employers.
- The TERO must establish and administer a Job Bank, but an employer can use any source for workers so long as the employer complies with the labor code.
- The TERO staff must establish counseling and other support programs to assist Indians with employment. Employers must cooperate with the committee to implement such programs.
- In any hearing before the committee on compliance with the law, the burden of proof is upon the employer, and not the employee, to show compliance.

## Chapter 4: Union Collective Bargaining Agreements

- Where an employer has a collective bargaining agreement with a union, the union must file a written agreement stating it will comply with the labor code and all rules, regulations and orders of the committee. An employer may not commence work until the agreement is filed with the committee.  
*Comment: Given the federal Indian law requirement that non-Indians must consent to civil jurisdiction, with some courts ruling that such agreements must be specific, this is an excellent provision. However, this is a consideration which should be addressed before any contact is given to an employer by the Indian nation.*
- Collective bargaining agreements must provide for:
  - Indian preference in referrals;
  - Cooperation with the TERO staff;
  - Training programs; and
  - Temporary work permits for Indians who do not choose to join the union.
- The “committee staff” is to provide a model union agreement.
- The code provisions on collective bargaining agreements do not constitute official recognition of any union or endorsement of any union activities within the Cherokee Nation.
- In any hearing on compliance with this chapter, the burden of proof to show compliance is on the employer and not the employee.

## Chapter 5: Complaints and Hearings

- The committee can file a complaint against an employer, contractor, subcontractor, or union if it “has cause to believe” it failed to comply with the code, or rules, regulations or orders of the committee. The committee must attempt an informal settlement, but if that is not possible, the committee can request a hearing.
- Individual Indians may file complaints with the committee, which it must investigate and attempt an informal settlement. If that is not possible, the individual or the committee may request a hearing.

- An employer or union that feels that any provision of the code, or any rule, regulation or order of the committee is illegal or erroneous, it may file a complaint, and the committee must investigate an attempt at an informal settlement. If that cannot be achieved, the employer or union may request a hearing.
- If anyone requests a hearing, there must be written notice “to all concerned parties” which states the nature of the hearing and the evidence to be presented. The notice must advise parties of the right to be present at the hearing, present testimony of witnesses and other evidence, and to be represented by counsel at their own expense.
- The following procedures must be followed during hearings:
  - All parties may present testimony and other evidence and be represented by counsel at their own expense.
  - The committee may have the advice and assistance of counsel provided by the tribe.
  - The chairman or vice-chairman of the committee must preside, and the committee must ascertain the facts and “a reasonable and orderly fashion.”
  - Any hearing may be adjourned, postponed or continued in the committee’s discretion.
  - The committee can take immediate action at the close of hearing or take the matter under advisement.
  - The committee must notify the parties of its decision within 30 days after the last hearing.

Comments: There are several civil rights concerns about this chapter:

The statute gives the committee an investigatory and conciliation role and an additional role as the trier of fact and law in quasi-judicial adjudication. While this is similar to the structure of many state human rights and anti-discrimination bodies, there is a problem of separating the body’s investigatory role from its adjudication role. If the two are clearly separated so that (for example) independent committees staff perform the investigatory and charging role and the committee is independent of that function, then there should be no due process problems. If, however, the committee is intimately involved in investigation, and it hears facts when performing its conciliation role, then there are due process

problems with the independence of the body for purposes of a due process fair hearing.

If the committee is composed of elected council officials, and if it imposes any form of penalty, then there are problems of a possible bill of attainder, which is prohibited by the Indian Civil Rights Act.

#### Chapter 6: Enforcement and Remedies

- The penalties for any employer, contractor, subcontractor or union that violates the code, or a rule, regulation or order of the committee, include:
  - Denial of the right to do business within the Cherokee Nation;
  - Suspension of operations;
  - The payment of back pays and damages to compensate an injured party;
  - An order to summarily remove employees hired in violation of the law;
  - Monetary civil penalties;
  - Prohibition against engaging in future operations;
  - An order requiring the employment, training or training of Indians injured by any violation;
  - An order requiring changes in procedures and policies to eliminate any violation;
  - An order for any other provision to alleviate, eliminate or compensate for any violation;
  - A maximum penalty of \$500 for each violation; and
  - There is a separate violation for each day the violation exist.
  - A party may appeal any committee decision to the Judicial Appeals Tribunal of the Cherokee Nation under the tribal constitution.
- The committee and all tribal agencies that issue business permits are

responsible to notify all employers of the obligation to comply with the code, and there must be notification of the law in all bid announcements.

- No new employer may do business with the Cherokee Nation until it has “consulted with the committee for meeting its obligations.”
- Employers must file reports at the request of the committee, and it or its representatives have the authority to make on-site inspections during regular working hours to monitor compliance. The committee also has the right to inspect records of an employer or union, speak with workers, and conduct investigations on job sites.

This is an extensive labor code, but it is limited in its scope. While it addresses Indian preference employment and focuses upon compliance and remedies in that regard, there is no real statutory authority to deal with common problems in labor law, including wages, conditions of employment, hiring and termination practices, discrimination (on a basis other than Indian status), job safety, and other issues.

The definitions provide that the Cherokee Nation Employment Rights Committee, “until changed by the Tribal Council,” must be composed of the Employment Committee members of the Cherokee Tribal Council. In other words, elected officials of the political arm of the Cherokee Nation sit as investigatory and adjudicatory officials. Given the penalties the committee can impose, outlined above, there are equal protection problems with a legislative body acting as an adjudicatory body, and there are dangers that a given penalty can be attacked as being a bill of attainder.

Given contemporary rules regarding non-Indians giving consent to the civil jurisdiction of a given Indian nation, this code provides for plenty of notice of required compliance in advance. There will be a separate discussion of “on or near reservation” Indian preference problems in the next of a series of three studies on Indian nation labor codes which will focus on the problems and issues in more detail.

### **3. Confederated Tribes of the Colville Reservation**

The Colville Tribe has three separate titles of its Code dealing with labor issues: An Industrial Safety and Health code, a Tribal Employment Rights code, and an Indian Preference in Contracting code. They provide:

Industrial Safety and Health (Title 6):

- Finding that personal injuries and illness arising out of employment impose a substantial burden on employees and employers, this law is adopted to create, maintain, continue, and enhance the industrial safety and health program of the

Tribes, to equal or exceed the standards prescribed by the Occupations [sic] Safety and Health Act of 1970. Comment: There has been a long period of controversy over the application of the federal OSHA law to Indian nations as a “law of general application.” While the Navajo Nation won the point of non-applicability under the Navajo Nation Treaty of 1868 (which restricts the classes of persons who can enter that Reservation), other Indian nations have lost, with a ruling that OSHA is a “law of general application” to Indian Country. This tribal law appears to be based upon a favorable court decision or a negotiated with the Occupational Safety and Health Administration.

- The pertinent definitions are:
  - An “employer” is any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in business, industry, profession, or activity “on” the Colville Indian Reservation who employs one or more employees or who contracts with one or more persons, for personal labor. The term includes the Tribes, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations.
  - An “employee” is an employee or an employer who is employed in the business of the employer and every person on the Reservation who is engaged in employment or working under an independent contract.
  - A “safety and health standard” is a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes which are reasonably necessary or appropriate to provide safe or healthful employment places.
  - A “work place” is any plant, yard, premises, room, or other place where an employee is or are located.
- The Colville Tribal Department of Industrial Health and Safety can, by rule, adopt a schedule of fees and charges to be paid by employers.
- The director of the Department may adopt rules and regulations for safety and health standards for conditions of employment. There must be public notice by publication in a newspaper of general circulation for the rule making, with a general description of the subject and information on how to obtain copies of the proposed rules and regulations for comments in writing. The director may hold a public hearing for notice and comment.
- The guidelines and standards for the rules are:

- Provide for the preparation, adoption, amendment, or repeal of rules and regulations;
- Provide for the adoption of standards at least as effective as the federal standards;
- Provide a method to encourage employers and employees to reduce the number of safety and health hazards and stimulate them to institute new and to perfect existing health and safety programs;
- Provide for standards dealing with gases, vapors, dust, or other airborne particles, toxic materials, or harmful physical agents;
- Provide for reporting by employers;
- Provide for the frequency, method, and manner of work place inspections without advance notice;
- Provide for new or perfected occupational safety and health education programs and a program for voluntary compliance through the use of advice and consultation, with recommendations;
- Provide for standards for trenches, excavations, and safeguards around openings of hoist ways, hatchways, elevators, stairways, and similar openings; and
- Provide standards for safeguards for vats, pans, trimmers, cut off, gang edger and for saws, planers, presses, formers, cogs, gearing, belting, shafting, coupling, set screws, love rollers, conveyors, mangles in laundries, and similar machinery.
- Each employer must furnish each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death. Employers must comply with rules, regulations, and orders under this chapter.
- The director or a representative may, upon producing credentials to an owner, manager, operator, or agent in charge:
- Enter without delay at all reasonable times the factory, plant, establishment, construction site, or other area, work place, or environment where work is performed by an employee;
- Inspect, survey, and investigate during regular work hours and other

reasonable times and in a reasonable manner, any work place; and

- Require the attendance and testimony of witnesses and the production of evidence under oath. The Tribal Court has jurisdiction to address situations where such attendance, testimony or evidence is refused.
- An employer may apply to the director for a temporary order granting a variance from standards. An application must show that the employer meets basic standards and that the employer is unable to comply because necessary construction or alteration of facilities cannot be completed by the effective date, and the employer is taking all available steps to safeguard employees and has an effective program to come into compliance. A temporary order must prescribe practices, means, methods, operations and processes the employer must adopt. An application for an order must contain:
  - A specification of which standard the employer “seeks severance;”
  - A representation, supported by proof, that the employer is unable to comply with the safety and health standard for specified reasons;
  - A statement of steps taken and to be taken, with dates, to protect employees from the hazard covered by the standard;
  - A statement of when the employer expects to be able to comply with the standard, and what steps have been taken or will be taken, with dates, to come into compliance; and
  - A certification that the employer has informed his employees of the application by providing a copy to them by posting.
  - An employer may apply for an order of variance from any rule or regulation after giving notice to employees.
- Employer and employee representatives may accompany the director during a physical inspection of any work place.
- Employees must comply with this law. An employee or employee representative who believes there is a violation of a standard that threatens physical harm, or an imminent danger, may request an inspection. The notice must be in writing and set out the specific grounds. A copy will be provided to the employer, with safeguards for the confidentiality of the employee. If the director determines there are reasonable grounds to believe a violation or danger exists, he must make a special inspection. If he believes there are no



reasonable grounds or danger, he must notify the employer and the employee in writing.

- If upon inspection or investigation the director believes an employer has violated a standard or an order, he will issue a citation which describes the nature of the violation, citing why, and fix a reasonable time for abatement.
- If the violation is “such that a danger exists from which there is a substantial probability that death or serious physical harm could result,” the director can issue a citation and an order immediately restraining such a condition. Employees must be notified. The director can also request the tribal prosecutor to apply to the Tribal Court for a temporary restraining order.
- If the director issues a citation, he must notify the employer and state that the employer must appeal within fifteen working days. The appeal must be heard by the Colville Tribal Safety Committee, and employees also have a right to participate.
- Any person aggrieved by an order which has been upheld by the Safety Committee may make an appeal to the Tribal Court within thirty days of the communication of the Committee order.
- Discrimination or retaliation against employees is prohibited.
- The Tribal Court has jurisdiction to enjoin any condition or practice where there is a substantial probability of death or serious physical harm in an injunction or temporary restraining order.
- An employer who willfully or repeatedly violates the law may be assessed a civil penalty of up to \$50,000 for each violation. An employer who has received a citation for a serious violation may be assessed a civil penalty up to \$5,000 for each violation. For a non-serious violation, the civil penalty is \$3,000 per occurrence, unless the violation is de minimus. The civil penalty for failure to correct a violation may be assessed a civil penalty of up to \$5,000 for each day a failure or violation continues. An employer who violates posting requirements may be assessed a civil penalty of up to \$3,000 for each violation. A “serious violation” is one where there is a “substantial probability” that death or serious physical harm could result.
- The criminal penalties include:
  - Advance notice without the director’s consent of an inspection carries a penalty of a \$1,000 fine, 6 months imprisonment, or both;

- False statements, representations, or certifications carry a fine of \$5,000, 6 months imprisonment, or both;
  - Willful and knowing violations of the law are punishable by a fine of up to \$5,000, imprisonment for up to one year, or both;
  - Any employer who receives an order immediately restraining a condition who continues to use a machine or equipment whose use is prohibited may be punished by a fine up to \$5,000, 6 months imprisonment, or both.
  - All information obtained by the director which has a trade secret will be considered confidential.
- Employers must make, keep and preserve records of their activities relating to this chapter. There must be regulations on accurate records, periodic reports of work-related deaths, injuries and illnesses.
  - The director is authorized to adopt any provision for a tribal plan under OSHA and enter into agreements.
  - The health and safety standards must be for all industries, trades, crafts and employments. The standards should prescribe the use of labels to warn of hazards, symptoms, emergency treatment and precautions for safe use. They should describe suitable protective equipment, medical examinations, and other precautions.
  - The director must develop and maintain an effective program of collection, compilation and analysis of safety and health statistics.

#### Tribal Employment Rights (Chapter 10-1)

- This chapter provides that:
- There is a policy declaration that jobs, subcontracts, leases and contracts on or near the Reservation are important resources for Indian people, and Indians have unique employment rights that should be promoted. Indians are also entitled to the protection of federal laws against discrimination. Accordingly, there should be an employment rights program and office to optimize the law and powers to increase employment and eradicate discrimination.
- The pertinent definitions are:

- An “employee” is any person employed for remuneration;
  - An “employer” is any person, partnership, corporation, or other entity that employs two or more employees for wages
  - A “covered employer” is any employer with two or more employees who, during any 20 day period, spend 16 or more hours performing work within the Colville Reservation lands;
  - A “commercial enterprise” is any activity by tribal, state or federal governments that is not a traditional government function, as defined by the Internal Revenue service;
  - An “Indian contractor” is any firm that qualifies for Indian preference under this chapter;
  - An “Indian” is any member of a federally-recognized tribe;
  - A “local Indian” is any Indian who resides within the lands and territories of the Colville Reservation or within 35 miles of those lands, but Indians residing on the Spokane Indian Reservation are not local Indians;
  - A “covered employer” is one with two or more employees spending 16 or more hours performing work within the Reservation during any 20 consecutive day period.
- All covered employers must give preference to Indians who meet threshold requirements of the job, with first preference to local Indians.
  - Entities awarding contracts or subcontracts for supplies, services, labor or materials for \$5,000 or more where the majority of the work will occur within the Reservation must give contracting and subcontracting preference to qualified entities that are 51% or more Indian owned and controlled. Those requirements do not apply to tribal, federal or state governments or subdivisions. They do apply to subcontracts, with certain exceptions.
  - Any covered employer with a collective bargaining agreement with a union must obtain its written agreement, subject to approval, it will comply with the law.
  - There is a Colville Tribal Employment Rights Commission with our members, with one from each “reservation political district,” and one alternative member.

The Colville Business Council appoints members. They serve a two-year term. Three commissioners is a quorum.

- The Commission's powers include:
  - The power to carry out the provisions of this chapter, propose regulations, and submit proposals to the Council for action;
  - Hold administrative hearings and issue findings and orders; and
  - Hear appeals from the actions of the Director.
  - There is a TERO Program director, appointed by the Council, with administrative authority.
- The director may:
  - Assist the Commission to propose adoption, amendment and rescission of rules, regulations or guidelines
  - Assess sanctions and represent the TERO in hearings and appeals and before any court or other adjudicatory body.
- The Commission may enter into cooperative agreements with federal employment rights agencies.
- There is an employment rights fee of 2% (one time) of all construction contracts of \$5,000 or more of the total amount of the contract, and every employer must pay a quarterly fee of 2% of quarterly payroll. The fee does not apply to educational, health, governmental, or nonprofit employers. It does apply to contracts by such groups with for-profit employers.
- Any person, group of persons, or organization that believes that a covered employer has violated the law may file a complaint with the TERO. It must be in writing, under oath, and provide sufficient information for the director to carry out an investigation. The director must investigate complaints, and if there is reason to believe there has been a violation, and TERO has jurisdiction, the director must proceed.
- The director or a field compliance officer must make investigations to determine whether there has been a violation. For that purpose, they may enter a place of business or employment during business hours to monitor compliance.

- The Commission may administer oaths, issue subpoenas, take evidence, and require the production of books or records.
- When the director has reason to believe a violation has occurred, the director must notify the employer in writing, specifying the violations. The director must seek informal settlement, and if that cannot be reached, issue a formal notice of noncompliance. The notice must state the nature of the alleged violation and steps to come into compliance. The notice must give five days to comply. If the director believes that irreparable harm might result, he can require compliance in fewer than five days. The notice must also advise of the penalties and the right to appeal to the Commission. There is a bond provision if the director can show good cause of the employer removing itself or property before a hearing. Hearings are conducted by a separate chapter of the Tribal Code. If the Commission finds the violation alleged, it may assess certain penalties, including:
  - Denial of the right to commence business;
  - Suspension of the party's operation;
  - Termination of the party's operation;
  - Denial of the right to conduct further business
  - A remedial civil penalty of up to \$500 for each violation;
  - Order the payment of back pay to an aggrieved person;
  - Order the dismissal of an employee illegally hired;
  - Order such other action as is necessary.
- An appeal to the Colville Tribal Court must be taken within 20 days after receipt of the Commission decision. Appeals are governed by separate provisions for administrative appeals.
- Following a final decision for monetary damages, the Commission may petition the Tribal Court for an order to seize and hold for sale property to ensure payment of monetary damages.
- Preferential treatment of Indians and Indian-owned firms is required for all employers.
- All employers must be notified of the obligation to comply with the law, and all

bid announcements issued for work must contain a statement that the successful bidder will be obligated to comply with the law.

- Employers are required to submit a compliance utilization plan to the director before the employer may commence work. There must be hiring goals and timetables and a specification of the number of Indians the employer must hire, by craft and skill level. Employers must participate in training programs. No employer may hire a non-Indian to fill a vacancy until the hiring hall has certified no qualified Indian is available or until 72 hours after notifying the hiring hall of the vacancy. No employer can use job criteria that are barriers to Indian employment and the burden is on the employer to show business necessity. There must be agreements with unions to implement this chapter, and no such agreement constitutes recognition of endorsement of any union.
- Employers must submit a compliance plan, including an employment and training plan. There must also be a contracting and subcontracting plan.
- An employer may recruit and hire from any source, but no non-Indian may be employed until the employer gives the TERO 72 hours to locate and refer a qualified local or non-local Indian. Prior to commencing work, employers must identify key, regular, permanent employees. No person who is not a local Indian may be employed until that person has obtained a work permit from TERO.
- Employers are required to assist Indians become qualified through training programs, and employers are required to cooperate with them.
- Job qualifications that are barriers to the employment of Indians are not prohibited except upon the employer's showing of business necessity. Employers must also make reasonable accommodation to the religious beliefs and cultural traditions of Indian workers.
- Employers must give preference to Indians in promotions.
- Employers must give preference to Indian summer students and encourage opportunities for Indian students.
- Retaliation is prohibited.
- There must be counseling and support programs.
- Indian preference is required in contracting and subcontracting.
- Preference must be given to qualified firms in the award of all contracts, and an

entity may select a contractor in any manner it chooses, provided that:

- If competitive bidding or proposals are used, competition is limited to certified firms. If the entity is unsure if there are any qualified firms, it may first public a prior invitation for certified firms to submit a statement of intent. If there are no statements of intent from any technically qualified firm, the entity may advertise for bids or proposals without limiting competition to certified firms and it may make an award to the low bidder. If only one certified firm submits a bid or statement of intent, the entity must award the contract to the firm so long as it is technically qualified and is willing to perform the work for a reasonable price.
- If the entity selects a contractor through negotiations or informal process, it may not enter into a contract with a non-certified firm unless it has contacted every certified firm and the relevant field and determined that there is no certified firm that is technically qualified to perform the work at a reasonable price. No non-certified firm may be selected so long as a certified firm meets the threshold qualifications.
- There is a preference in the award of subcontracts to certified firms, with the same limitations as to contracts.
- Entities and their contractors and subcontractors must determine technical qualifications and a reasonable price:
  - If an entity determines there are no certified firms that are technically qualified, the entity must provide them a written description of areas in which it believes the firm is weak and steps to upgrade its qualifications. Certified firms may file complaints regarding the grounds of rejection.
  - Before rejecting all certified firms on the basis of price, the entity must offer one or more firms an opportunity to negotiate price.
  - Once an entity enters into a contract with a certified firm, the TERO will not intervene in any way unless a certified firm shows that action taken against it is intended to circumvent the law.
  - No Indian firm may represent that it is exercising management control of a project to qualify for Indian preference when in fact management control is exercised by a non-Indian entity, and the Indian entity is acting as a front or brokering its services.
  - While reciting abuses in certifying firms as Indian preference eligible, this section sets out specific criteria for evaluating firms as being

genuinely “Indian.”

- There is an application process for certification, with probationary certification and final certification. There is a procedure to withdraw certification.
- There are fees for doing business and collection procedures.
- Employers with a permanent place of business within the Reservation must pay one half of one percent of each quarter’s payroll.
- All entities must submit reports as required by TERO and there are provisions for on-site monitoring.
- If there is reason to believe an entity has failed to follow the law, the TERO must give notice in writing, specifying the alleged violations. The TERO must then conduct an investigation and attempt to achieve an informal settlement. If there can be no settlement, the director must proceed with enforcement procedures. Hearing procedures are set by a separate law.
- Sanctions include:
  - Denying the right to commence business;
  - A civil remedial penalty of \$500 for each violation;
  - Suspension of the party’s operations;
  - Termination of the party’s operations;
  - Back pay to an aggrieved Indian;
  - The dismissal of Indians illegally hired;
  - Other remedial action to insure compliance.
  - Appeals are to the Tribal Court in a separate appellate statute.
  - Hearing bonds are authorized.
  - There is a provision for post-decision attachment by the Tribal Court.
  - There are provisions for injunctions and temporary restraining



orders by the Tribal Court upon a showing of irreparable harm.

- The pre-hearing procedures include:
  - The employer’s right to review the TERO case file;
  - A list of witnesses;
  - Pre-hearing interviews of witnesses;
  - Subpoenas of documents and things;
  - Postponements.
- The hearing provisions address:
  - The chair as the presiding officer with procedural authority;
  - The TERO director must be present;
  - Parties may have counsel “as an advisor;”
  - The hearing must be recorded;
  - Parties may testify without fear of reprisal;
  - The decision must be in writing and issued within 30 days after the hearing, and it must consist of:
    - The facts;
    - The finding with the legal and factual basis for the finding;
    - Orders and sanctions imposed, if any;
    - Information on the right to appeal;
    - Information on the authority of the Commission to act if the party fails to comply and fails to appeal; and
    - Any injunctive bonding requirements.

Indian Preference in Contracting (Chapter 10-3).

- The contracting preference requirements are:
- In general:
  - This chapter specifies the methods and procedures that agencies and instrumentalities of the Tribe must follow to give preference to qualified Indian-owned enterprises and organizations when contracting, and all contractors when subcontracting.
  - Agencies must comply with this chapter, and they are responsible for compliance of their contractors.
- The certification process addresses:
  - Proof of Indian ownership by showing membership in a federally recognized Indian tribe and evidence that the applicant is at least 60% Indian owned and at least 60% of the profits will flow to the Indian owner(s) during all portions of the contract or subcontract term.
  - There must be a showing of capability to manage all work.
  - Preference in the award of contracts and subcontracts let under an “Invitation for Bids (IFB)” process (i.e. conventional bid construction and material supply contracts) is required, and that process should not be used unless there is a reasonable expectation that two or more qualified Indian-owned enterprises are likely to submit responsive bids. There is a statutory formula to evaluate monetary bids.
  - If the award process is by a “Request for Proposals (RFP),” then the RFP may be restricted to Indian-owned firms. There should be no such restriction unless there is a reasonable expectation that “the required minimum number of qualified Indian-owned enterprises” are likely to submit proposals. There must be a point system to evaluate proposals. Pre-certification is permitted.
  - Where preference is not feasible, the agency must document its determination in writing, maintain files for TERO review for three years, and provide the TERO with a copy of the determination within 20 days of issuance.
- The “other preference provisions” are:
  - When both tribal and federal funds are used for a project, the work under each should be separately identified and federal Indian preference regulations apply to the federal portion. If the funds

cannot be separated, the federal standards apply.

- Each agency and contractor is responsible for enforcing and monitoring Indian preference, and they must take appropriate action in instances of non-compliance.
- Preference restrictions also apply to off-reservation activities.
- There is a complaint procedure for the filing of complaints against an agency or contractor. Complaints must be filed within 20 days from the date of the action or omission complained of. The agency or contractor must make an effort to resolve the complaint, with appropriate steps in the event of non-compliance. If the matter is not resolved within 15 days, the complaining party may make a complaint to the TERO Commission. The agency or contractor must provide a written report to the Commission stating all the facts and what was done. Upon receipt of the report, the Commission will make a determination, and it may order a hearing.
- The Commission may impose sanctions upon the agency or contractor upon a determination that the complaint was valid, with money damages up to the amount of profit the complaining contractor or subcontractor might reasonably have received. A manager of a tribal agency found to be in willful non-compliance may be subjected to disciplinary action.

These three Colville codes are well-written and drafted, and among the various versions of standard “TERO” legislation, its TERO code is perhaps the most complete and detailed.

#### **4. Fort Peck Employment Rights Code**

The Fort Peck Tribe of Montana’s employment rights code is in Chapter XIII of its codified statutes. It has seven chapters that address definitions, the Tribal Employment Rights Office, a Tribal Employment Right Review Board, employment preference, contracting and subcontracting preference, voluntary Indian preference, and liaison officers.

##### Chapter 1: Definitions

- The first definition is linked to the “on or near” Indian preference provisions of Title VII of the United States Civil Rights Act of 1964, and it defines “Near the Reservation” as being “within reasonable daily commuting distance of any Indian community on the reservation.

- “TERO” means the Tribal Employment Rights Office.
- “Director” means the TERO director.
- “Review Board” refers to the Tribal Employment Rights Review Board created by the code.
- A “Covered entity” under the code is any individual, corporation, association, partnership, or other entity doing business on trust land on the reservation. *Note: While the Fort Peck Reservation has established boundaries, this provision is restricted to trust land. The definition does not separate land held in trust by the United States for the Fort Peck Tribe or land held in trust for individual Indian allottees. The definition could be read to apply in all “Indian country” within the Fort Peck Reservation as such is currently defined in federal Indian law.*
- A “contract and subcontract” means all contracts, including but not limited to, contracts for supplies, services and equipment, “regardless of tier.”

## Chapter 2: Tribal Employment Rights Office

- This section creates the “Fort Peck Tribal Employment Rights Office (TERO)” as an independent office of the [Assiniboine and Sioux] Tribes, reporting directly to the Tribal Executive Board in such manner as the Tribal Executive Board directs.
- This section provides for a director of TERO who is appointed by the Tribal Chairman, subject to the approval of the Tribal Executive Board, and who serves at the pleasure of the Board. The director has the authority to hire staff, expend funds appropriated by the Board, and obtain and expend funds from federal, state or other sources to carry out the purposes of the TERO.
- The functions of TERO are:
  - To implement and enforce the employment rights code.
  - To provide training, counseling and support to Indian workers on the Reservation in conjunction with tribal employment and training programs and other tribal and federal offices.
  - Cooperate with federal agencies to enforce federal anti-discrimination statutes, eliminate discrimination against Indians, and enforce Indian

preference in federal law or contracts with the federal government.

*Observation: This code appears to have been written in an earlier time when the U.S. Labor Department funded Indian training programs, and it is designed to give the TERO the authority to get funding under such programs. In Montana, and many other states, the state investigates complaints of discrimination filed with the EEOC, which would include national origin and race discrimination against Indians. Similar codes should provide for cooperation with such state agencies.*

- Initially, the TERO was required to develop and phase in programs “at a gradual pace” to ensure a stable and effective program and avoid “unnecessary disruption of the business environment on the Reservation.” The TERO has the discretion to implement programs on a Reservation-wide basis or implement programs for particular types of covered entities. No “significant new program” can be introduced or extended to “new types of covered entities” without the approval of the Tribal Executive Board.
- TERO must assist the Equal Employment Opportunity Commission (EEOC) and other federal agencies in ensuring protection of the rights of Indians under Title VII or other federal laws by disseminating information about complaints, meeting with EEOC and other federal agency officials, assisting Indians and employers in obtaining informal resolution of complaints and mediating, and assisting Indian in filing and processing charges where informal resolution fails.
- The TERO director must file annual reports with the Tribal Executive Board.
- Tribal employment and training programs and Bureau of Indian Affairs employment assistance programs are required to prepare Indians for job opportunities, coordinate with TERO to develop training programs, and cooperate with TERO in carrying out its functions.

### Chapter 3: Tribal Employment Rights Review Board

- There is a Fort Peck Tribal Employment Rights Review Board, consisting of three members and two alternates appointed by the Tribal Executive Board, to serve at its pleasure. There is a quorum when there are two members or one member and an alternate.
- A Review Board member must have a high school diploma, be at least 25 years of age, not have been convicted of a felony or dishonorably

discharged from military service, not be affiliated with or employed by a business certified under the law, be physically capable of carrying out the duties of office, and "in the opinion of the Tribal Executive Board, Abe of sound judgment, good character and possess a reputation for honesty, fairness, and impartiality. *Comment: This provision is obviously designed to assure a fair and impartial quasi-judicial tribunal for administrative adjudication purposes to satisfy the due process requirement of an independent body.*

- The Tribal Executive Board determines the amount of compensation to be paid to the Review Board members.
  
- The Review Board's jurisdiction includes:
  - Hearings and sanctions under the Indian employment preference section.
  - Hearings and sanctions for violation of the Indian contracting and subcontracting provisions.
  - The certification of "Indian firms" under the code.
  - Reviewing the actions of TERO "at the instance of aggrieved parties."
  
- The Review Board has the power to deny or suspend the right to do business upon trust land, but an employer has a reasonable time to remove any equipment or other property it has "on the Reservation" and to arrange with another party to assume a contractual obligation. "Reasonable time" means a maximum of 30 days. The Board can deny or suspend the right to commence new business. It can award back pay or monetary relief "to correct harm done" by non-compliance, and it can impose civil fines of up to \$500 per violation. Each day an entity is out of compliance is considered to be a separate violation. *Comment: There should be no due process problem with an independent quasi-judicial administrative adjudication body such as this, which has the authority to grant specific relief (including what is essentially exclusion from the Reservation or the denial of the right to do business on trust land). There may be a challenge to a civil fine as being prohibited "punishment" of non-Indians. A levy of punitive damages in civil actions has been upheld in New Mexico as not being prohibited punishment. One problem, however, could be that if a large civil fine based upon many days of non-compliance is levied, a court might rule that there is no fair relation between that amount and damages to the Tribe as a form of liquidated damages set by the statute.*

- Parties in hearings before the Review Board has the right to counsel at their own expense, to be present at the hearing, to present relevant sworn testimony and documentary evidence, to call witnesses, and to ask questions of witnesses of other participants. The Board need not observe formal rules of evidence, and hearings must be conducted in an orderly manner. *Comment: This section provides the minimum elements of civil procedural due process of law. While there may be some objection to the evidence standard, it is similar to the Montana rules for administrative quasi-judicial bodies.*
- The Review Board must issue a written decision after the hearing which states the grounds for the decision, and it must be sent to all participants by registered mail.
- A party can appeal a decision of the Review Board to the Tribal Court within 30 days after receipt of the decision. The court has the authority to reverse the Review Board only if the decision is arbitrary and capricious or unsupported by substantial evidence. *Comment: Many judicial review statutes in Indian Country provide for an evidentiary review of an administrative decision, but what is the court's role if there is a mistake of law or a violation of civil rights under the Indian Civil Rights Act or tribal civil rights law?*

#### Chapter 4: Employment Preference

- Every “covered entity” must give preference to “Indians resident on or near the Reservation” in hiring, promotion, and training of employees on trust land.
- TERO must maintain an “index” of Indians seeking employment and their qualifications.
- A business may recruit and hire employees from any source or the process it chooses, but it may not hire a non-Indian until the TERO certifies that no qualified Indian meeting the employer’s qualifications are listed on its index. TERO will identify such qualified Indian employees or make a referral from the index. As to job qualifications, an employer “may not include non-job-related qualifications which have a discriminatory impact on Indians.”
- Where there is a layoff or reduction in force, no Indian can be terminated if a non-Indian in the same craft or job stays employed. If the layoff is by crew, Indians must be transferred to crews that remain so long as there are non-Indians in the same craft or job employed.
- Employers must give preference to Indians in promotions and encourage Indians to seek promotion. If a supervisory position is filled by a non-Indian, but employer must file a report with the TERO stating what Indians applied for the

job, why they were not given the job, and the efforts to inform Indians of the opportunity.

- Indian preference applies to summer student help, and the employer must “make every effort” to promote after-school, summer, and vacation employment for Indian youth.
- A collective bargaining agreement is not an “excuse” for failure to comply with Indian preference. Employers with collective bargaining agreements must get an agreement from the union or give satisfactory evidence it will comply with the code, give “absolute preference” to Indians in referrals, establish mechanisms for Indians so they do not have to travel “great distances” to keep their place on union lists, establish journeyman upgrade and advance apprenticeship programs for Indian workers, “blanket in” Indians who qualify for and wish to join the union, and grant work permits for Indians who do not wish to join the union. TERO participation in any agreement with a union is not official tribal recognition of that union or endorsement of recruiting activities by the union.
- Any person or entity who believes a covered entity has not complied with the law can file a complaint with the TERO, regardless of a showing of personal harm.
- If the TERO has reason to believe, by a complaint or its own investigations, that a covered entity is not in compliance with the law, it must notify the entity in writing specifying alleged violations. If the alleged violator is a contractor or subcontractor, the holder of the permit must be notified. There is 20 days to pursue a voluntary and informal resolution of the problem. If no resolution can be reached within 20 days, the TERO must notify the Review Board and request a hearing within 20 days.
- Retaliation for the exercise of rights under the code is prohibited. The TERO also has the authority to petition the Tribal Court to order reinstatement or other relief to prevent harm caused by retaliation.

#### Chapter 5: Contracting and Subcontracting Preference

When a covered entity is engaged in any aspect of oil and gas development on trust land or engaged in the improvement of real estate on trust land, it must give preference to firms certified by the Tribes. *Note: This provision addresses business activities which are unique to the Fort Peck Reservation, and covers activities on trust land. This squarely covers issues of consent (so that consent should be in any Bureau of Indian Affairs-approved contract dealing with gas and oil leases or land development) and whether the activities are within Indian Country.*



- Covered entities must give contracts and subcontracts to certified firms and may not enter into such arrangements with firms that are not certified unless it has contacted every certified firm that is technically qualified and willing to perform the work at a reasonable price. If a certified firm meets the “minimum threshold qualifications,” no other firm can be selected. If a certified firm lacks the qualifications to perform the work, the entity must make a good faith effort to divide the work into smaller portions so the certified firm can qualify. An entities contractors and subcontractors must comply with this provision, and these requirements cannot be circumvented by hiring non-Indians and designating them as employees rather than contractors or subcontractors. Note: This provision addresses the common problem in Indian Country of Indian firms not being able to obtain bonding or other qualifying coverage. It addresses the abuse of hiring people as “employees,” when they are really contractors. The common abuse of designating an Indian as a “partner” is covered in the certification of Indian firms.
- A covered entity must determine the “technical qualifications” required for any contract or subcontract. If it determines that a certified firm is not qualified, it must interview the principals in all available certified firms to determine their knowledge and expertise and provide each certified firm that is rejected a description, in writing, of areas where the firm is weak the steps needed to upgrade its qualifications. The entity must evaluate a certified firm that does not have an established record based on the individual qualifications of its principals and other relevant factors which provide guidance on the firm’s ability to perform the work. *Comment: One of the problems with economic development in Indian Country is encouraging private Indian business. Individual Indian business people have problems with obtaining credit and capital, getting professional licenses, bonding, and they face other impediments to doing business. This section requires developers and employers to examine precisely what kinds of qualifications and skills are necessary for a given project, closely examine the exact skills and qualifications of Indian businesses, and attempt to include the Indian business or help it qualify in the future.*
- Before or at the time a covered entity submits a request for a permit, lease or authorization to the Executive Board, it must submit a contracting and subcontracting plan to the TERO for approval. The plan must indicate the contracts and subcontracts that will be offered and their dollar amounts. If a firm has already been selected for contract or subcontract work, it must be named, with an indication of whether it is a certified firm. If not, the applicant must indicate why a firm certified by TERO was not selected, and the name of contact persons in certified firms the applicant contacted, and why the firm was not selected. No authorization will be granted to any firm that submits a plan of

less than 100% of the value of subcontracts will be paid to certified subcontractors unless there is a showing that the applicant was unable to employ Indian firms for subcontracts or because there were an insufficient number of Indian firms qualified or available. To show that, the applicant must show that a sufficient number of Indian firms was not available to meet its goal, or firms that were available were rejected because they lacked the necessary technical qualifications, or that no certified firm was willing to do the work at a reasonable price after negotiation. Those who submit plans and get approvals cannot deviate from their plan, and the TERO has the right to inspect records to ensure compliance with the plan.

- The Tribes will not intervene in any contractual relationship with a certified firm unless a certified firm shows that action taken against it was intended to circumvent the requirements of the code.
- When a non-certified firm is hired because no certified firm existed at the time, and a certified firm comes into existence, TERO must immediately notify the entity of the existence of the certified firm. In that instance, the non-certified firm must be replaced with a certified firm if the contract or relationship with the non-Indian firm is expected to extend to more than one year after notification by the TERO, the certified firm is “technically qualified to do the work,” and the certified firm is prepared to undertake the work on the same terms, including price. If the non-certified firm has a year-to-year contract, it can be replaced only when the contract expires. If the contract expires within 120 days after notice of a certified term by TERO, the contract with the non-certified firm can be extended for no more than 30 days from the notice. If there is no written contract or its not a year-to-year contract, the entity has 30 days to replace the non-certified firm with the certified firm. These provisions may be waived on a showing of hardship.
- All entities must submit required reports to TERO, but they can refuse to submit information if it can show that it is “confidential for valid business purposes.” The TERO can make on-site inspections during regular business hours to monitor compliance and talk with any employee “so long as it does not interfere with the operations of the business.”
- Certified firms, a group of certified firms, or any other person or entity which believes there is failure to comply with code can file a complaint with the TERO, whether or not there is personal harm. *Note: There was a Montana Indian business contractor’s organization which was covered by this provision.*
- If the TERO has reason to believe, through a complaint or its own investigations, that an entity engaged in covered activity on trust land has failed

to comply with the code, the TERO must notify it of the alleged violation(s), along with contractors or subcontractors. There is 20 days to pursue a voluntary, informal resolution of the problem, and if that fails, the TERO must notify the Review Board for a formal hearing within 20 days.

- To receive certification as a firm eligible for Indian preference, the applicant must show:
  - The entity must have 51% Indian ownership, as demonstrated by formal ownership arrangements, value for ownership, and profits;
  - There must be “significant Indian management control,” shown through actual arrangements, including unitary firms and joint ventures;
  - The structure must have integrity and not be established to take advantage of Indian preference;
  - The employees must be such as to show there is no non-Indian control;
  - The experience and resources of the non-Indian partner(s) must be greater than the Indians to show a sound business reason for a non-Indian to accept a junior role other than to take advantage of Indian preference.
  - The applicant must have its principal place of business on or near the Fort Peck Reservation.
- The individual or entity must submit an application and a \$25 fee, and the application must set out:
  - Name, address, business name and address, the period of time the entity has done business on the Reservation, and if the applicant is an individual, proof that the applicant is an Indian;
  - Information to show that the applicant is eligible for Indian preference;
  - Information on the origins and history of the applicant and its employees for purposes of evaluation for Indian preference;
  - Proof the applicant is qualified to conduct and operate the business for which the certification is sought;
  - A statement of the applicant’s policy on the employment of Indians and

the history of past employment of Indians who are resident of the Reservation; and

- A statement that the applicant's statements are true and correct, and that if any material is false, the license will be void and of no force or effect.
- TERO may grant a six month probationary certificate, and it must monitor the firm's activities to ensure it operates in accordance with its application.
- The TERO can grant full certification or deny certification at the end of the probationary term.
- The TERO has the power to initiate proceedings to withdraw or suspend certification. If so, it must prepare an analysis and recommended disposition for the Review Board and send the firm notice, along with the grounds for the action. The Review Board must set a hearing date within 21 days of receipt of the analysis and recommended disposition. The TERO staff must present the case for suspension or withdrawal at the hearing, and the Board may withdraw certification, suspend certification for up to one year, put the firm on probation, or order corrective action within a fixed period of time. A firm whose certification is withdrawn may not reapply for up to one year.
- A firm holding an Indian preference certification prior to the effective date of the code remains certified without making a new application, but the certification can be withdrawn if the firm does not meet the Indian preference criteria.
- Certified firms must report any changes in ownership or control to the TERO within 60 days of the change. Certified firms must update the information they submitted in the initial application every year.
- The TERO must maintain a list of certified entities, post them in a conspicuous place and make them available to the public.
- Retaliation for the exercise of rights under the code is prohibited, subject to sanctions and TERO seeking protective orders from the Tribal Court.

#### Chapter 6: Voluntary Indian Preference

- Non-covered entities should give Indian preference.
- There is a request in a section that before opening a new business or beginning a new project, employers should notify the TERO of its intentions so the TERO

can ascertain how many employees the employers expects will be hired and the qualifications required. The TERO must determine how many Indians should be hired to give voluntary Indian preference. *Comment: This voluntary policy assumes that Title VII's "on or near reservation" provision has meaning and that employers will comply in good faith. This addresses the situation where the Indian nation may not have regulatory or ad judicatory jurisdiction over an employer, but the employer should take advantage of Title VII's provisions for Indian preference hiring.*

- The TERO must provide employers with a list of Indians in its index who meet the employer's qualifications or refer Indians to the employer.
- The voluntary preference policy applies to oil and gas subcontracting on or near the Reservation
- The first week of each month, the TERO must report the names of employers or entities it has found honoring and not honoring the Indian preference policy to the Executive Board. *Comment: This is an example of the use of social norm theory to carry out the policy without jurisdiction. That is, recent studies have shown that "shaming" businesses to be in compliance with the law is somewhat effective, and that praising businesses that comply has an even better effect.*
- The Tribes of the Fort Peck Reservation [Assiniboine and Sioux], and all tribally-owned corporations, must give Indian preference in awarding contracts and conducting business transactions.
- The TERO can publish the names of employers who are in compliance with, or not in compliance with, the Indian preference policy, with ten days notice to the entity and an opportunity to advise if there is a mistake.
- Any person aggrieved by an action of the TERO or its director can appeal it to the Review Board. The standard for review is whether the action was arbitrary, capricious, beyond the authority of the TERO, or in violation of federal or tribal law. There is no liability for monetary damages if the TERO, its director, or its employees acted in good faith.

## Chapter 7: Liaison Officers

- Any covered entity engaging in geophysical exploration on trust land, drilling for oil and gas on trust land, or geophysical exploration or drilling for oil and gas on fee land where a right-of-way has been granted on trust land to facilitate the activity on fee land, must employ a Liaison Officer. Covered entities building roads, power lines, telephone lines, water lines, sewer lines, or oil or

gas transportation lines or other public utilities across trust land or across fee land where there is a trust land right-of-way, must employ a Liaison Officer if the project exceeds \$20,000.

- Liaison Officers must be employed from the start of a geophysical project through final inspection or from site preparation through completion, plugging, or abandonment, for drilling operations.
- The duties of a Liaison Officer are to:
  - Act as a liaison between the entity and the tribal oil and gas committee, the Tribal Minerals Resource Department, the TERO and the Bureau of Indian Affairs;
  - Detour projects around historical sites;
  - Inspect rights-of-way or the permitted or leased area for the condition of the land, livestock, and fencing throughout the project;
  - Report all violations of land damage, fire, employee discrimination, and TERO regulations to proper authorities; and
  - File weekly reports to the Tribal Oil and Gas Committee or Tribal Mineral Resources Department, TERO and the Bureau of Indian Affairs on all daily activities.

*Comment: This is a fascinating provision, because it provides a means for the Tribes to have employers hire people to serve as an in-between with tribal and federal authorities, address tribal cultural concerns, check the condition of land and animals, report violations of law, and file reports to alert tribal officials and others. It is a means of regulatory enforcement where the employer pays for it. We may question how effective it is for an employer to have its own employee reporting violations, but this is a means of enforcement. If nothing else, it promotes the employment of tribal members.*

- The Director of TERO sets the rate of compensation for liaison officers.

This is a very clever way of attempting to enforce Indian nation regulatory and adjudicatory jurisdiction and the Title VII “on or near reservation” Indian preference provision. It carefully gets around jurisdiction problems on a checker boarded reservation such as Fort Peck by limiting enforcement jurisdiction to activities on trust land and asking for voluntary compliance on fee land. It attempts to anticipate evasion of the law by covering specific instances of evasive activity, and it establishes realistic qualifications for Indian preference in contracting by defining the qualifications of Indian-owned firms in detail. It establishes relationships with federal anti-discrimination and other enforcement agencies with the obvious goal of involving those federal

agencies. It also recognizes the social norms content of civil rights law by providing for voluntary compliance, the praise of those who comply voluntarily, and public criticism of those who do not. While this code is limited in the labor law goals of offering detailed protection for workers, it is an example of a tribal regulatory and enforcement infrastructure for limited purposes which could be expanded. The quasi-judicial adjudicatory powers of an independent body comply with due process and the hearing body is insulated from the political body, except for appointment.

## **5. Gila River Indian Community**

The Gila River Tribal Employment Rights Office is addressed in Chapter 1 of Title 12 of its Tribal Code. It is a short code, which provides that:

- There is a Tribal Employment Rights Office which is a “separate office and function” of the Community Office of Employment and Training, with the authority to issue rules, regulations and guidelines, and the power to hold hearings, subpoena witnesses and documents, require employers to submit reports, and take other actions “as are necessary for the fair and vigorous implementation of this chapter.”
- All employers “operating” within the exterior boundaries of the Gila River Indian Reservation are required to give preference to Indians in employment.
- Employers with collective bargaining agreements with a union must obtain the union’s written agreement it will comply with the Gila River Indian preference laws, rules, regulations, and guidelines. The TERO office can approve the agreement. It does not constitute official tribal recognition or sanction of any union.
- The Tribal Employment Rights Office is authorized to:
  - Set hiring goals for employers and specify the minimum number of Indians an employer should hire, by craft or skill level.
  - Require employers to establish or participate in training programs to increase the pool of qualified Indians on the Reservation “as quickly as possible.”
  - Establish a tribal job bank and impose a requirement that no employer may hire a non-Indian until the Job Bank certifies there is no qualified Indian available to fill a vacancy.
  - Prohibit employers from using qualifications criteria or other personnel requirements that serve as barriers to Indian employment unless the

employer can show that “such criteria or requirements are required by ‘business necessity.’”

- Require employers to give preference to Indian-owned firms and entities in awarding contracts and sub-contracts.
  - Establish programs, in conjunction with other government agencies, to counsel Indian workers to assist them in employment. Employers must cooperate with counseling programs.
  - Take other necessary actions to achieve the purposes and objectives of the code, except that a “significant new component” is subject to prior approval by the Tribal Council.
- The Comprehensive Employment and Training Act program (CETA) and the Bureau of Indian Affairs Training Act program are required to commit resources to prepare Indians for job opportunities, and the tribal employment and training office is required to establish a Construction Worker Training Program to be certified by the Department of Labor. The various offices must coordinate their activities. *Comment: This is a clever use of existing federal grant programs and training initiatives in a statute. Are these passing opportunities or long-term programs which can be addressed in a statute?*
  - The TERO’s funding is through the “Tribal CETA Program,” and there is a provision to seek monies from other federal programs before applying for tribal funding.
  - The TERO has the power to impose sanctions or penalties on any employer “only as a last resort.” The director of the office must first attempt to resolve any alleged failure to comply using informal means.
  - Employers who do not comply with the law may be subjected to a combination of civil sanctions, and the director can impose certain civil sanctions without the approval of the Community Council, namely:
    - Require an employer to make changes in its procedures and policies to comply with requirements;
    - Pay back pay, re-employ, promote, train, or give other relief to Indians who are harmed by non-compliance;
    - Impose monetary fines of up to \$1,000 per day for non-compliance;
    - Suspend an employer’s operation until corrective action is taken or a plan of corrective action is developed.



- The director can impose other sanctions with the approval of the Community Council:
  - Terminate an employer’s operations on the Reservation; or
  - Prohibit the employer from engaging in future operations on the Reservation.
  - No sanctions can be imposed until the affected employer has been given an opportunity to present evidence to the director showing that a sanction or sanctions should not be imposed. The director must give at least five days notice of any proposed sanction to be imposed by the director of the Community Council.

This is a short and very simple TERO-labor statute, and it is a kind of “short-hand” version of the legislation reviewed above. Given recent developments in Indian nation jurisdiction law, the jurisdictional provisions of this code must assume that all or most of the land within the Gila River Indian Reservation is land held in trust for the Tribe or its members. There is neither a Council regulatory, enforcement, or adjudicatory body or an independent hearing body. Does that violate due process of law? Arguably it does not, so long as an employer can get a fair hearing before the director or the Community Council. This does not provide for appeals to, or any linkage with, a tribal court. That would be possible if the jurisdiction statute of the Tribal Court provides general civil jurisdiction for all activities within the reservation and for general injunctive powers.

## **6. Hoopa Valley Tribe**

The Hoopa Valley Tribe of the Hoopa Valley Indian Reservation of California has extensive code provisions, and a statutory personnel policy that outlines the rights of employees. The personnel policy will not be reviewed, because it is an employer’s document and not a code of general application.

A code enacted on April 27, 1995 (Ordinance No. 2-80) establishes the standards and procedures for employment practices and the application of Indian preference. It has an extensive preamble stating the reasons to enacting the law and identifying the conditions that prompted it, including a sound and progressive socio-economic environment, the need to clarify policies and procedures to insure consistent enforcement and employer compliance, and the need to expand and consolidate the TERO Office. The code is codified as title 13 of the Hoopa Valley Tribal Code, which is an extensive code published in looseleaf format and organized in ring binders. The “Standards and Procedures for Employment Practices and Application of Indian Preference” provisions of title 13 provide:

- The short title of the law is the “Tribal Employment Rights Ordinance” or “TERO.”
- There is a repealer of prior provisions, with a grandfather provision for existing

agreements and contracts.

- The TERO Commission has the authority to certify enterprises that meet the definition of “Indian firm” and to document minority small business contract eligibility or exemptions from state taxation. There is a limitation that certification will not oblige the Commission to advocate the claims of individuals or entities before any agency of another government.
- Certain standards for timber operations remain in place, so long as they do not conflict with the TERO ordinance.
- There is a definitions section which has these definitions:
  - An “Indian” is any member of a federally recognized tribe or any person who furnishes proof that he or she is recognized as Indian by the United States under its trust responsibility. *Comment: This definition recognizes that an individual can be an “Indian” for many purposes. It adopted the general federal statutory limitation that one is an “Indian” by membership in a “recognized” Indian tribe, but someone can also be an Indian in situations where other federal programs recognize one’s status as Indian.*
  - An “employer” is any person, company, contractor, subcontractor or entity located or engaging in commercial or employment activity “on the Hoopa Reservation,” and which employs two or more persons. *Comment: This assumes that most of the land within the reservation is trust or allotted land and that there is little or no checker boarding. The Hoopa Valley Tribe has been unsuccessful in litigating civil jurisdiction over fee land within the Reservation.*
  - An “Indian Firm” is a firm or business certified by the TERO Commission as eligible for Indian preference, “provided” that Indians hold at least 51% ownership in the firm or business and exercise “majority management control.”
  - A “minimum threshold” means a minimum level above which Indian preference will be required, established by job descriptions, interview committees, skills tests, RFP’s and license requirements, and other written agreements.
  - There is a Tribal Employment Rights Commission (TERO Commission) to implement and enforce the code, and provide “exclusive and independent investigation and administration of personnel actions and grievances arising under the Personnel Policies and Procedures of the Hoopa Tribe” (including unemployment, disability, and worker’s compensation laws) which cover the Tribe “or other entities.”

- The Commission can hire staff, obligate appropriated funds, and adopt bylaws, and it can:
  - Issue rules, regulations, interpretations of law, and guidelines for Indian preference. Rules must be approved by the Council. *Note: This language, which allows the Commission to make “interpretations of law,” gives it broad authority to give advisory opinions or make binding statements of law in decisions.*
  - Maintain an Indian Skills Bank to provide qualified Indian employees to employers. The Commission must actively recruit Indians for listing, and actively recruit and certify Indian firms.
  - Certify Indian firms, from on or off the Reservation, for Indian preference, minority small business contract eligibility, exemption from state taxes and bonds, and other purposes.
  - Register off-reservation contractors and sub-contractors, approve Indian preference plans, and issue permits.
  - Investigate complaints on violations of the law.
  - Hold hearings on any matter under its authority, including hearings on the issuance, modification, or revocation of any permit, license, certification, or assessment, and conduct adjudicatory hearings on violations of the law or of any other general tribal law or specific departmental employee grievance procedure.
  - Negotiate cooperative agreements with state and federal agencies relating to the law or to eliminate unlawful discrimination against Indians.
- The Commission has five members, who must be “in good standing in the community.” The Council appoints three members in October of even numbered years, and two are appointed in odd numbered years. The Council may remove members at any time for cause, subject to notice and an opportunity for a hearing. Commission decisions are by majority vote and three members constitute a quorum.
- There is a TERO Director who is the investigating agent for the Commission who is responsible for investigating, researching, reporting and documenting information required by the Commission. The director reports to the Commission.
- All employers must give preference to qualified Indians in all aspects of employment. No employer can recruit or employ a non-Indian unless the TERO Commission has

written notice that no qualified Indians are available for the position.

- The law applies to all employers (listing them) unless they are “clearly and expressly prohibited by federal and other tribal laws” from coverage.
- Indian preference applies to all job classifications, skill areas, and crafts and all administrative, supervisory, and professional classifications.
- Indians are qualified for employment if they meet “the minimum threshold requirements for such position,” and no employer may use any employment criterion that is not “legitimately related” to performance of the position.
- The Hoopa Valley Tribe must give Indian preference in order of (1) tribal membership, (2) Indian spouses of members, (3) “other resident local Indians” and (4) other Indians. Note: While some Indian preference laws give preference to member Indians, this provision separates general Indian preference from tribal membership for employers other than the Tribe itself. Some laws give preference to any spouse of a member, but this provision gives preference only to “Indian” spouses. There is no definition of who a “resident local Indian” is.
- Employers must prominently display a notice to all employees and applicants of their rights under the law.
- Employers are prohibited from retaliation against any person exercising rights under the law, and the Commission can impose sanctions for retaliation. The Commission can enter a retaliation order on its own or seek a remedy in Tribal Court. It is authorized to issue temporary injunctions to prevent unlawful conduct.
- There is a TERO tax on employers with total contract or annual gross revenues of one thousand dollars or more. The tax is 1% of the total gross value of any contract performed within the reservation or total annual gross revenues.
- All employers engaging in commercial or employment activities within the Reservation must:
  - Be certified by the Commission;
  - Have an Indian preference plan, which must be included in bids. The plan must identify proposed subcontractors, whether they are Indian-owned or not, and give information on good faith steps to identify Indian firms for subcontracts. A contractor cannot refuse to employ an Indian subcontractor for price so long as that firm’s price is within 5% of the lowest bid, calculated by multiplying the lowest bid by 105%. A contractor cannot refuse to employ an Indian subcontract so long as the firm “satisfies the threshold requirements for

technical qualifications.”

- An apparent successful bidder who fails to submit an Indian preference plan will be considered to be a non-responsive bidder.
- If the employer is awarded the bid, that successful bidder may not deviate from the plan or add or delete any existing new subcontracts or subcontractors without the written consent of the Contracting Officer and notice to the Commission.
- Contractors are prohibited from bid shopping, which is where a bidder or contractor informs a prospective subcontractor that it will receive a subcontract only if it offers a price lower than that proposed by another firm.
- Employers and subcontractors employed by a primary contractor which has one or more contracts totaling at least \$10,000 cannot participate in more than one area of the overall project. A superintendent or similar supervisor employed by the primary contractor cannot be employed in any other aspect of the project.
- Prospective contractors and bidders must identify their regular, permanent employees in the bid package. A “regular, permanent employee” is someone who has been on the annual payroll or is an owner. *Note: This is the “core employee” requirement, where genuine employees of a firm are not disqualified if they are not Indian. This is a difficult provision to apply in practice.*
- An Indian worker cannot be laid off so long as a non-Indian worker in the same craft is still employed, as long as the Indian worker meets the threshold qualifications of the job, unless the non-Indian has been employed 90 days or longer than the Indian. If the layoff is by crews, qualified Indians must be transferred to crews that are retained, so long as there are non-Indians in the same craft employed elsewhere on the Reservation under the same contract.
- There are grandfather provisions for existing contracts.
- Employers must submit monthly reports to the Commission showing the number of employees, a tally for Indians, monthly hires and fires, and other information as required.
- In implementing the Ordinance, the Commission may:
  - Impose numerical hiring goals and timetables, specifying the minimum number of Indians an employer must hire;
  - Attend and monitor job interviews;

- Prohibit employers from establishing “extraneous” qualification criteria or requirements that “serve as barriers to Indian employment;”
  - Enter into agreements with unions and other employers to insure compliance;
  - Require employers to give preference for contracts and subcontracts to Indian-owned firms and businesses;
  - Establish programs of counseling and support for Indian workers to assist them to get employment. Employers can be required to participate in or cooperate with such programs;
  - Issue permits to implement the Ordinance and other agreements.
- The Commission has certain enforcement powers, including:
    - Investigation and monitoring of complaints, concerns and inquiries about Indian preference “and other employment related concerns;”
    - Issue citations and subpoenas to employers on violations of the Ordinance or “other written personnel policies of the Council or tribal entities,” and impose civil penalties (including fines) “as may be reasonably necessary to remedy the consequences of a violation of this Ordinance or to deter future violations.”
    - Hold hearings to resolve complaints and hear concerns; and
    - Bring or defend a complaint in Tribal Court for enforcement of the Ordinance and personnel policies of the Tribe and tribal entities.
    - Appeals from the TERO Commission are to the Tribal Court. No standard of review is set under this section.
    - The Commission can consult with the Legal Department and can request representation in proceedings in Tribal Court in “complex cases,” cases of major impact, or cases where the workload of the Commission and the Department warrant. The section establishes a rebuttable presumption that there is no ethical conflict of interest.
  - The Ordinance is remedial legislation “intended to rectify the long-standing problem of severe under-employment of Hoopa members and other Indians living in the Reservation community.” It is to be construed liberally to carry out its purposes. Doubtful issues are to be resolved in favor of filing a grievance and to obtain judicial review.

- There is a severability provision if any provision of the Ordinance is ruled to be invalid.
- Nothing in the Ordinance is a waiver of the Tribe’s sovereign immunity.
- A separate ordinance (Res. No. 91-71A, March 6, 1995) provides for complaint procedures for the Hoopa Tribal Employment Rights Commission. It provides:
  - The purpose of the procedures is to establish clear and uniform procedures for complaints and other matters before the Commission.
  - Any individual, group of individuals, organization, business or entity who believes that any covered employer or entity has violated any requirement in the Ordinance or regulations can file a complaint with the TERO director.
  - The Director must investigate every complaint and every employee appeal under the personnel policies and report to the Commission. If the Commission believes there is a reason to believe there has been a violation, the Commission may schedule a hearing or take enforcement action. The TERO director must give a written report to a complainant within 15 days of the filing of a complaint.
- The Commission must investigate any violation of the law. The investigation must be carried out by the TERO director, who has the authority to enter the workplace to investigate, during working hours.
- If a complaining or appealing party or employer wishes a hearing, it may request one within ten work days after the mailing of the TERO director’s report. The Commission can hold hearings on its own initiative. A hearing must be held within 30 working days after receipt of a hearing request. The hearing can be for an enforcement action, to hear input on proposals, to hear employee grievance appeals, or the hearing may be in furtherance of an investigation. The Commission must designate a hearing officer to preside.
- The Commission has the power to administer oaths, issue subpoenas, take evidence, and require the production of documents which are “material to the inquiry.”
- If the Commission determines that a “violation of the TERO has occurred,” it can notify the employer or entity, specifying the violation. The Commission can withhold the names of complainants when there is a “substantial reason ... to believe” there may be retaliation. The Commission must seek to achieve informal settlement, and if it cannot informally resolve the matter, it must issue a formal notice of non-compliance, which also advises of the right to a hearing before the Commission.

- The notice of non-compliance must set out the nature of the violation and the steps needed to comply. It must give at least five days to comply. A person receiving notice may request a hearing before the Commission, which must be held within five to twenty work days.
- If there is a danger that the person requesting the hearing may remove itself or its property from the jurisdiction prior to hearing, the Commission may require the party to post a bond in an amount to cover possible monetary damages. If the party fails or refuses to post the bond, the Commission can petition the Tribal Court for interim and injunctive relief.
- The Commission or an “authorized agent” may conduct the hearing. Technical rules of evidence do not apply. Hearings must be recorded.
- If the Commission determines a violation has occurred, it may take action.
- There is Tribal Court judicial review of Commission decisions, or if the Commission fails to act. A request for judicial review must be filed within twenty working days of receipt of the Commission decision. The standard for review is whether the decision is “arbitrary, capricious, or contrary to law,” the usual administrative law standard for judicial review.
- The Commission also has separate bylaws, which govern its internal operations.

The Hoopa Valley Tribe has a sophisticated TERO law which gives detailed coverage to the subject and includes tribal employment standards and employee grievances. There is some mixing of investigatory and adjudication duties for the TERO Commission, which may be grounds for due process challenges to the effect that if the Commission is too intimately involved with the investigation and review of a matter before the opportunity for an adversarial hearing, that will prejudice the Commission at such a hearing. The Tribal Court is available for interim remedies and for judicial review, based upon the facts or the law.

## **7. The Leech Lake Tribal Employment Rights Ordinance**

Leech Lake’s Tribal Employment Rights Ordinance is based upon the “standard” TERO law which has been reviewed here, but it has two important provisions which deserve mention. First, the definitions section defines the term “conflict of interest” for purposes of public-private relationships would could cause a public official to disregard duties or be improperly influenced in making a public decision. That is an important aspect of TERO law management. Second, the Code defines “consensual relations with the tribe” to mean that “Any construction firm, contractor, architect, supplier of services, labor or materials who performs work within the Reservation boundaries with the tribal governments or it entities.”



The Code then addresses “consensual relations” and “non-consensual relations” in terms of required compliance plans for contracting and subcontracting. Where a covered entity intends to engage in a “consensual business activity,” it must file an acceptable plan to meet its obligations under the TERO law. Where there are Anon-consensual relations, or “the Project does not directly impact the Band’s lands,” the tribal TERO Commission will work with such contractors to work cooperatively “toward the goal of hiring qualified Indian workers.” This Code recognizes, and attempts to address, the problem of regulatory and ad judicatory jurisdiction, but in a manner which is not very satisfactory.

## **8. The Lummi Nation Tribal Employment Rights Ordinance**

The Lummi Tribal Employment Rights Ordinance is codified in Title 25 of its Code. It is directed at Indian preference employment, citing general legislative need, Title VII of the U.S. Civil Rights Act of 1964 in Indian preference employment (at 42 U.S.C. Sec. 3200 C-1), the Bureau of Indian Affairs Indian Self-Determination and Education Assistance Act preference regulation 25 C.F.R. Sec. 2371.44), and Office of Federal Contract Compliance Program (OFCCP) regulations of January 1977 on Indian preference on or near reservation. The ordinance provides that:

- It is the “Lummi Tribal Employment Rights Ordinance” or “Lummi TERO.”
- All employers are required to give preference to Indians in contracting, subcontracting, hiring, promotion, training and all other aspects of employment. Note: Unlike other codes, there is no reference to a territorial jurisdiction or other limitations in the scope of application of the law.
- The ordinance is grounded in Article VI, Sec. 1(p) and Article VI, Sec. 2 of the Constitution and By-laws of the Lummi Tribe without an indication of what those powers provide.
- The relevant definitions are:
  - “Commerce” includes all trades, traffic distribution, communications, and transportation, provision of services, fishing, manufacturing, production, agricultural production, building, maintenance, construction, banking, mining, and energy resources production.
  - An “employee” is any person earning wages for work performed on or near the Lummi Indian Reservation.
  - An “employer” includes any person, company, contractor, sub-contractor, or other entity located or otherwise engaged in work on the Lummi Reservation which employs two or more persons for wages. It also includes state, county, and other governmental agencies, and the contractors and sub-contractors. It

includes the Lummi Indian Business Council, unless the Council is exempted under another law or the Personnel Manual. The term also includes contractors and sub-contractors of any other employer.

- A “covered employer” is any employer with two or more employees that spends 40 or more hours performing work within the boundaries of the Lummi Reservation during any 30-day period.
- An “Indian” is any enrolled member of any federally recognized Indian Tribe, and all other persons of one half or more Indian blood of tribes indigenous to the United States, Eskimos, and other aboriginal people of Alaska.
- An “Indian owned firm or entity” is any commercial, industrial or other business activity or entity in which “the equity ownership and controlling Indian ownership constitutes not less than 51%.”
- The definition of “Indian preference” is that all other qualifications being equal, qualified local Indians residing on or near the Lummi Reservation are given preference over non Indians in employment and training and will receive preferential treatment with first consideration being given to Lummi Tribal members, second consideration to other Indians, and third consideration to spouses of Lummi Indians. *Note: This is a tribal preference statute. An Indian spouse would qualify for the second consideration because that person is “Indian,” and non-Indian spouse would qualify for “third consideration” preference.*
- An Indian resident or Resident Indian is any Indian who resides in Whatcom County, Washington for sixty days.
- “Near the Reservation” means any employer located within daily commuting distance of the reservation.
- “Wages,” means payment for work done on a regular basis for another.
- The ordinance applies to all lands and areas within the exterior boundaries of the Lummi Reservation and other lands subject to the jurisdiction of the Tribe.
- There is a Tribal Employment Rights Commission to administer the TERO, with the powers to:
  - Establish and enforce TERO regulations;
  - Establish and collect TERO fees and taxes;

- Enforce the Indian Preference provisions of the TERO;
  - Investigate, report and take regulatory actions for compliance; and
  - Safeguard the jurisdiction of the Lummi Nation.
- There are three commissioners and one alternate, appointed by the Business Council, for staggered three-year terms.
- The Commission has the power to:
    - Use the tribal Personnel Department to hire and fire employees and to set salaries within an approved budget;
    - Establish rules and regulations;
    - Expend funds and seek other funding;
    - Establish numerical hiring goals and timetables, specifying the maximum number of Indians an employer must hire by craft or skills. Hiring goals and timetables for hiring, retention and promotion of Council employees must be negotiated with the Personnel Office, and disputes between individual employees and the Council are decided under the Personnel Manual. *Note: This section has provisions for all employers as to the maximum number of Indians that must be hired (rather than a minimum, as in other codes) and there is a special provision for tribal employees);*
    - Require employers to establish or participate in job training programs to increase the pool of Indians eligible for employment;
    - Prohibit employers from using job qualification criteria or personnel requirements that may bar Indians from employment unless the criteria are required by business necessity. The Commission may adopt EEOC guidelines or additional requirements to eliminate employment barriers unique to Indians and the reservation;
    - Recommend that the Council enter into agreements with unions and insure union compliance with the ordinance;
    - Require employers to give preference to tribal and other Indian owned businesses in contracts and subcontracts;
    - Hold hearings and subpoena witnesses and documents;

- Require employers to submit reports and take all action to implement the Ordinance;
  - Recommend cooperative agreements to the Council with federal and state agencies to eliminate discrimination against Indians; and
  - Take such other actions as are necessary to achieve the purposes and objectives of TERO office.
  - All remedies must be exhausted before going to court. *Note: The exhaustion of remedies is usually a judicial abstention doctrine. It is put in this code to prevent other applications to the court.*
- Any person who is aggrieved by a decision of the TERO Director may appeal to the Commission by filing a petition for review and serving a copy on the TERO Director.
  - When a petition is filed, the Commission Chair must schedule a meeting to hear it, and give at least five working days notice. There must be an electronic or verbatim record of the hearing. Testimony is under oath, and parties may be represented by counsel at their own expense. Such counsel must be admitted to practice before the Lummi Tribal Court. The Commission may receive any relevant evidence. The Commission must issue a written opinion of decision within fifteen working days after the close of the hearing, giving reasons for the decision. The filing of a petition for review does not stop the operation of the TERO Director unless the Commission so orders.
  - Any person may appeal from the Commission to the Lummi Indian Business Council within ten calendar days of the date of the Commission decision. The person taking the appeal must file a transcript of the hearing. The Council must take up the appeal at a meeting within thirty calendar days from the date of the transcript. Review is limited to whether the Commission afforded due process and a fair hearing, or errors of law. No new evidence may be received and no argument can be presented unless it was first presented to the Commission. The Council must issue a decision within fifteen calendar days of the meeting when the appeal is considered.
  - Any person may appeal from the Council to the Tribal Court. The Council waives its immunity from suit for the limited purpose of such appeals. Only equitable relief may be awarded, and money damages cannot be awarded. Judicial review is limited to whether the appellant was given due process by the Council, or if the Council committed an error of law. Relief is limited to a declaration of the correct law for a new hearing before the Council.
  - The Commission can hold hearings to investigate compliance with the ordinance. There must be written notice to all parties which states the nature of the hearing and the

evidence to be presented. Parties must be advised of their right to be present at the hearing, present testimony and other evidence, and to be represented by counsel at their own expense. Testimony is under oath.

- If the Commission has cause to believe that an employer, contractor, subcontractor, or union has failed to comply with the law, it can file a complaint and notify the party of the allegations. The Commission must attempt to achieve an informal settlement, and one cannot be achieved, the Commission may request a hearing.
- Individual Indians who believe they have been discriminated against by an employer because the complainant is an Indian may file a complaint with the Commission. The Commission must investigate an attempt to achieve an informal settlement, and one cannot be achieved, the individual or the Commission may request a hearing.
- The procedures at hearing are the following:
  - The parties present the testimony of their witnesses and other evidence;
  - The Commission may have the advice and assistance of the tribal attorney;
  - The Chair or Vice-chair must preside, and no formal rules of evidence or procedure need be followed. The Commission must “proceed to ascertain all the facts in a reasonable and orderly fashion;”
  - Proof is by a preponderance (“more likely than not”) standard
  - The Commission may continue hearings;
  - The Commission can take immediate action or take the matter under advisement at the close of the hearing; and
  - The Commission must notify all parties of its decision within fifteen days of the hearing.
  - The penalties for violations of the Ordinance or regulations are subject to civil sanctions which include:
    - Denial of the right to commence or do business;
    - Suspension of all reservation operations;
    - Payment of back pay and damages to compensate an injured party;

- An order to summarily remove employees hired in violation of the law;
  - Monetary civil penalties not to exceed \$500 per day for each violation or \$10,000 per violation;
  - Prohibition from engaging in any future operations on the Reservation;
  - An order requiring the employment, promotion, and training of Indians injured by the violation;
  - An order requiring changes in procedures and policies to eliminate the violations; or
  - An order for any provision necessary to alleviate, eliminate, or compensate for any violation.
  - The TERO director assesses penalties.
- There is an Employment Rights Office with a director, who reports to the Commission and the Administrative Director of the Council. The director is appointed by the Commission, with the usual administrative authority, and the power to issue regulations, rules, and guidelines to implement the ordinance. The director can hold hearings, subpoena witnesses and documents, require employers to submit reports, issue cease and desist orders, petition the Commission and Tribal Court for removal orders, and take other action to implement the ordinance. *Note: The power to petition for a “removal order” is unclear. Does that mean exclusion from the Reservation?*
  - There is an Employment Rights Tax, of 1% of the total amount of contracts over \$10,000, paid in installments over the length of the contract. Covered employers, other than construction contractors, must pay an annual fee of one-half of one percent of annual payroll. The fee does not apply to Tribal, educational, health, governmental, or non-profit employers.
  - The Commission can issue regulations in the same manner, and using the same procedure, as Council ordinances.
  - The Commission must notify and send a copy of the Ordinance to every employer operating on the reservation and other interested parties. All bid announcements by a federal, state, or tribal agency, or other private or public entities, must contain language that the successful bidder will comply with the ordinance and all other rules, regulations and orders of the Commission. All tribal and federal agencies that issue

business or tribal permits and contracts are responsible to advise prospective employers of their obligations.

- As of the effective date of the ordinance, no new employer may commence work until they have consulted with the Director or Commission to meet their obligations under the ordinance.
- Employers must submit reports or other information as requested by the Commission. The Commission and the Director can make periodic on-site inspections during regular working hours to monitor compliance. The Commission and the Director have the right to inspect and copy all relevant records, and the right to speak to workers on conduct on-site inspections.
- Funds collected from employer taxes and other resources are to be put into a special account for use by the TERO office and the Commission.
- Employers with a collective bargaining agreement must obtain written agreement from a union or unions stating the union will comply with the Indian preference law.
- Employers with collective bargaining agreements must enter into a Compliance Plan. The payment of prevailing wages under the Davis-Bacon Act is not required unless such a prevailing wage provision is included in the Compliance Plan. *Comment: The statute does not tell us what a “compliance plan” is. Would this provision satisfy the NAHASDA Davis-Bacon waiver? Most likely not, unless the compliance plan addresses the issue of tribal prevailing wages.*
- The Lummi Tribal Police are authorized and directed to enforce any cease and desist or related orders issued by the Commission and the Director. The orders do not require a judicial decree or order for them to be enforceable. Police officers are not civilly liable for enforcing the orders when they are signed by the Director and Commission.
- There is a severability provision if any part of the ordinance is found to be invalid.
- The ordinance covers all employers operating within the exterior boundaries of the Reservation, whether or not they were doing so when the law is implemented.
- The ordinance is effective upon approval by the Lummi Indian Business Council.

This is an example of a TERO ordinance for a smaller tribe. Its jurisdiction provisions may predate recent federal court decisions regarding activities on fee land, or there may be little or no checker boarding in this reservation. The allocation of powers between the TERO Commission and the Director is somewhat confusing, and the division of rulemaking, investigatory, and decision-making is somewhat mixed. This is a model where the enforcement officer has

rulemaking, investigatory, and decision powers, subject to review by the Commission, the Council, and the tribal court.

## 9. The Navajo Nation

The Navajo Nation's labor code is in six chapters of Title 15 of the Navajo Nation Code. It is commercially published, but it has not been updated since its last publication in 1995. The labor provisions create and establish powers for the Office of Navajo Labor Relations (ONLR) and the Navajo Nation Labor Commission, and they set out labor provisions in the Navajo Preference in Employment Act (NPEA), child labor provisions, a worker's compensation code, and special provisions for the Crownpoint Institute of Technology. The ONLR, Commission, NPEA and child labor provisions are reviewed here.

- The Office of Navajo Labor Relations is covered in chapter 3 of Title 15, and it provides:
  - There is an Office of Navajo Labor Relations or ONLR.
  - ONLR's purposes are:
    - To monitor and enforce the Navajo Preference in Employment Act;
    - To implement and carry out Navajo Nation labor policies as established by the Navajo Nation Council;
    - To act as an administrative agency for employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment. Note: This is general labor jurisdiction, as is often found in state labor departments;
    - To gather information from employers, employees, labor organizations, and governmental agencies relating to employment, compensation and working conditions. *Note: This too is a function much like similar state agencies;*
    - To recommend and propose policies, rules, regulations and guidelines, concerning labor and employment to the Human Services Committee of the Navajo Nation Council. Note: The committee has the power to promulgate regulations for enforcement of labor laws and policies and laws relating to veterans services under 2 NNC Sec. 604(B)(1) (1995); and
    - To assist and encourage the peaceful settlement of labor disputes within



the Navajo Nation.

The personnel powers of ONLR are set out in one section.

- The authority, duties and responsibilities of ONLR are:
  - To ensure employers comply with the NPEA in employment and training of enrolled members of the Navajo Nation;
  - To recommend appropriate services for the employment of Navajos;
  - To monitor and enforce Navajo labor laws, rules, policies and regulations;
  - To recommend laws, rules, regulations, guidelines and policies to accomplish the purposes of NPEA;
  - To require employers to submit reports and information to carry out the purposes of NPEA;
  - To give an annual report to the Council and a quarterly report to the Human Services Committee on the extent to which employers are complying with the NPEA;
  - To assist in coordinating education and job training programs to provide qualified Navajo workers for employers;
  - To ensure appropriate preferential treatment and training provisions in all agreements by employers;
  - To establish minimum employment and labor provisions for inclusion in all agreements entered into by employers;
  - To investigate and make administrative determinations on compliance by employers with the NPEA or labor provisions in contracts, leases, permits and other agreements;
  - To file formal complaints with the Navajo Nation Labor Commission, participate as a complainant in hearings, and to make application to the Commission for subpoenas; and
  - Take all necessary action to accomplish the purposes of the NPEA.
  - The ONLR and its legal counsel are required to avoid ex parte communications

to avoid disclosure to the Commission and its staff of specific factual or legal issues concerned alleged violations of the NPEA under investigation which are not a matter of Commission record.

- The ONLR must have a main office in Window Rock, Navajo Nation (Arizona) and it may establish sub-offices.
- This section of the labor code, called a “Plan of Operations,” can be amended by the Government Services Committee of the Navajo Nation Council. *Note: This is an unusual provision which is unique to the Navajo Nation. The Government Services Committee takes the place of the former, powerful “Advisory Committee,” which had special legislative authority.*

The powers and authority of the Navajo Nation Labor Commission are set out in chapter 4 of Title 15:

- There is a Navajo Nation Labor Commission.
- The Commission’s purposes are to:
  - Serve as an administrative hearing body under the Navajo Preference in Employment Act;
  - Conduct and hold administrative hearings;
  - Process and decide all formal complaints before it; and
  - Adopt rules and regulations for hearings.
- The Commission’s organization is:
  - It has five members;
  - Two members are appointed by the Human Services Committee of the Navajo Nation Council with the concurrence of the Government Services Committee, and three members appointed by the President of the Navajo Nation with the concurrence of the Government Services Committee. *Comment: There are usually members of the Navajo Nation Council on the commission, and it is inappropriate for elected political officials to serve as adjudicators;*
  - The Commission members must be familiar with labor practices and requirements of the Navajo Nation. One member must be a worker who is familiar with union practices;
  - The Commission may elect officers;

- There are provisions for vacancies, conflicts of interest and compliance with the governmental ethics law.
- The authority, duties and responsibilities of the Commission are to:
  - Submit an annual report to the Human Services Committee, the Intergovernmental Relations Committee and the Navajo Nation Council;
  - Establish administrative and operating policies;
  - Regulate the course of hearings and conduct of participants;
  - Administer oaths;
  - Rule on motions and procedural matters;
  - Grant applications for subpoenas and rule on petitions to revoke them;
  - Inquire fully into all issues and obtain a complete record upon which decisions will be rendered;
  - Receive, rule on, exclude, and limit evidence, lines of questioning, or testimony which are irrelevant, immaterial, or unduly repetitious;
  - Examine witnesses to clarify facts and issues;
  - Direct the submission of briefs;
  - Issue findings of fact, conclusions of law and orders, and impose appropriate damages, sanctions, fines and other relief for non-compliance;
  - Set the amount of bonds and conditions;
  - Prepare and submit an annual budget; and
  - Exercise any other authority conferred by law.
- The chair calls meetings and three Commission members constitute a quorum. The Commission must adopt rules and keep a record of all proceedings. All formal action must be taken by a written resolution.
- The Commission may employ independent legal counsel and staff.

- The office and staff must be located in Window Rock, Navajo Nation (Arizona).
- The statute for the Commission, called a “Plan of Operation,” may be amended by the Intergovernmental Relations Committee of the Navajo Nation Council, with prior review of amendments by the Human Services Committee. *Note: The Intergovernmental Relations Committee is composed of the chairman of the Navajo Nation Council and the chairs of the other seven standing committees of the Council.*
- The Navajo Preference in Employment Act (NPEA) is set out in chapter 7 of the Title 15 Labor Code. It provides:
  - The law is called the Navajo Preference in Employment Act.
  - The purposes of the Act are:
    - To provide employment opportunities for the Navajo work force;
    - To provide training for the Navajo People;
    - To promote the economic development of the Navajo Nation;
    - To lessen the Navajo Nation’s dependence upon off-Reservation sources of employment, income, goods and services;
    - To foster the economic self-sufficiency of Navajo families;
    - To protect the health, safety, and welfare of Navajo workers; and
    - To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.
- The relevant definitions of NPEA are:
  - “Employment” is the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention and recall of employees;
  - An “employer” includes all persons, firms, associations, corporations, and the Navajo Nation and its agencies and instrumentalities, who engage the services of any person for compensation, as an employee, agent, or servant;

- “Navajo” is any enrolled member of the Navajo Nation;
- “Probable cause” is a reasonable ground for belief in the existence of facts warranting the proceedings complained of;
- “Necessary qualifications” are job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications for education, training and job-related experience, but excluding qualifications to perform other employment position responsibilities. A demonstrated ability to perform essential and basic responsibilities satisfy necessary qualifications;
- “Qualifications” includes the ability to speak or understand the Navajo language and familiarity with Navajo culture, customs and traditions;
- A “person” includes individuals, labor organizations, governments, and private and public, profit and nonprofit entities however organized;
- An “employee” is an individual employed by an employer;
- A “labor organization” or “union” is an organization which exists to deal with employers on grievances, employment disputes, wages, rates of pay, hours or other terms and conditions of employment.
- The Navajo employment preference is defined and regulated as follows:
  - All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contact with the Navajo Nation (and the reason for the bracketed language is not explained) must:
    - Give preference in employment to Navajos, including specific Navajo affirmative action plans and timetables to achieve the Navajo Nation goal of employing Navajos in all job classifications including management and supervisory positions;
    - When an employer commences business it must file a written Navajo affirmative action plan with the ONLR. Where there is a labor organization, the plan must be jointly filed by the organization and the employer. The labor organization must have the same obligations as the employer. The failure to file a plan, a plan which does not meet the requirements of the Act, or noncompliance with the plan is a violation;
    - The ONLR must give reasonable guidance and assistance to employers and labor organizations to develop and implement a Navajo affirmative

action plan. The ONLR can approve or disapprove a plan;

- There are specific requirements for Navajo preference, including:
  - Employers must specify a Navajo employment preference statement in job announcements, ads, and employer policies;
  - Employers must post an ONLR preference policy notice in a conspicuous place;
  - Seniority systems are subject to the Act and other labor laws, and they cannot operate to defeat or prevent application of the Act. Otherwise lawful and bona fide seniority systems are valid;
  - Employers must utilize Navajo Nation employment sources and job services for recruitment and referrals, but that obligation does not apply if a Navajo is selected and is a current employee;
  - Employers must advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, but that requirement does not apply if a Navajo is selected and is a current employee;
  - All employers must use non-discriminatory job qualifications and selection criteria in employment. *Note: The Navajo Nation Supreme Court has construed this subsection as a general anti-discrimination statute;*
  - Employers must not penalize, discipline, discharge, or take any adverse action against any Navajo employee without just cause, and a written notification citing just cause for any action is required in all cases. *Note: The Navajo Nation Supreme Court has used principles of equal protection to extend this protection to all employees (in a case involving a Hopi employee). The Court has struggled with the problem of when the written notification must be given;*
  - Employers must maintain a safe and clean working environment and provide conditions which are free of prejudice, intimidation and harassment. *Note: The Navajo Nation Supreme Court has pointed to the word “prejudice” as evidence the NPEA is also an anti-discrimination code. The issues of freedom from intimidation and harassment are controversial topics in general discrimination law, and the term “harassment” may be the basis for anti-bullying policies*

*which are in development at this stage of labor law;*

- Training must be an integral part of specific affirmative action plans and employer activities;
- There must be employer-sponsored cross-cultural programs in affirmative action plans, with programs to focus on education for non-Navajo personnel on Navajo culture;
- No fringe benefit plan on medical or other benefits, sick leave, or other personnel policy may discriminate against Navajos in coverage on the basis of cultural or religious traditions, coverage must accommodate such beliefs.
- Irrespective of the qualifications of any non-Navajo applicant, a Navajo applicant who demonstrates the necessary qualifications for an employment position must be hired, retained when there is a reduction-in-force, but among a pool of applicants, the best qualified Navajo may be hired or retained.
- Employers must have the necessary qualifications for each employment position in writing and provide a copy to applicants at the time they express an interest in the position.
- Employers doing business or engaged in any project or enterprise in the Navajo Nation within the territorial jurisdiction must submit employment information or reports as required to ONLR to determine compliance with the Act.

Navajos have a “basic right” to organize, bargain collectively, strike, and peaceably picket, but those rights do not apply to employees of the Navajo Nation. It is unlawful for any labor organization, employer or employment agency to take any action which directly or indirectly causes or attempts to cause any policy or decision which violates the Act.

There is an extensive prevailing wage statute, which addresses:

- Definitions:
  - A “prevailing wage” means the wage paid to a majority (more than 50%) of employees in the classification on similar construction projects in the area during a period of up to 24 months prior to the effective date of the prevailing wage set, but if the same wage is not paid to a majority of employees in the

classification, “prevailing wage” means the average of wages paid, weighted by the total number of employees in the classification.

- “Prevailing wage rate” means the rate established by ONLR.
- “wage” means the total of the basic hourly rate, and the amount of contributions paid to a bona fide fringe benefit fund, and costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits.
- “Area” for determining the prevailing wage means “the geographic area within the territorial jurisdiction of the Navajo Nation.” If there are insufficient similar construction projects in the area, it means the geographic boundaries of such contiguous municipal, county or state governments as ONLR determines necessary to secure sufficient wage information on similar construction projects.

#### Establishing wage rates:

- ONLR must establish a general prevailing wage for each classification within specified types of construction for all construction reasonably anticipated to occur in an area. ONLR must define classifications and types of construction in accordance with industry guidelines. Where construction is contemplated and prevailing wage rates have not been set, the “contract letting entity” must submit a written request for a project prevailing wage scale. The request must be submitted not less than 60 days prior to the scheduled date for bid solicitation and include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR must use best efforts to provide a project prevailing wage scale for each classification within 60 days of receipt of a request.
- In setting prevailing wage rates, ONLR must conduct surveys and collect data it deems necessary and sufficient to make a wage determination. Wage data may be collection from contractors, contractors’ associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area.



- No contract-letting entity, contractor or subcontractor may proceed with a construction contract without a contractual requirement for the payment of prevailing wages pursuant to an ONLR determination. Violation of that obligation renders the contract-letting entity and employer jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, with interest.
- This section does not apply to a contract for architects, engineers, legal or consultant services or the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or subcontractor; to a construction contract for a project with a total cost of \$2,000 or less; to a construction contract let by a natural person who is an owner for that person's personal, family or household purposes; to a construction contract performed by employees of an owner; to a construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act; to a construction contract which requires payment of wages pursuant to a wage scale established under a collective bargaining agreement; and there are exceptions for apprentices and trainees.  
*Comment: The subsection dealing with federal authorities setting the prevailing wage under the Davis-Bacon Act is an example of the renvoi principle in the law of conflicts of law. That is, the NPEA tells us there to look to the Davis-Bacon Act and similar provisions, and NAHASDA tells us to look back to Navajo Nation law. Given the existence of a Navajo Nation method of determining prevailing wages, the exception would not apply.*
- Employers must adopt and implement work practices which conform to occupational safety and health standards imposed by law. *Comment: The Navajo Nation is unusual, because the Tenth Circuit Court of Appeals ruled that the federal Occupational Health and Safety Act (OSHA) does not apply to the Navajo Nation because of its 1868 treaty with the United States. Therefore the "standards imposed by law" are those under Navajo law, and there is a Navajo Nation agency similar to OSHA.*

All transaction documents (leases, contracts, etc.) Must contain a provision that the employer or other contracting party agrees to strictly abide by the requirements of the Act. If there is no such language, the terms and provisions of the Act are incorporated in the document as a matter of law. Every bid solicitation, etc. for prospective contracts must expressly provide that the contract will be performed in strict compliance with the Act. If that language is not in the solicitation, the terms of the Act are deemed to be incorporated in it as a matter of law.

- ONLR has the responsibility for enforcement, and there are extensive provisions for charges, an ONLR investigation, the dismissal of charges, a probable cause determination, settlement, an individual right to sue, ONLR charges, the ONLR right to sue, the initiation of proceedings before the Navajo Nation Labor Commission, preliminary relief, intervention in Commission proceedings and confidentiality. *Comment: There is a lengthy and detailed scheme for Navajos filing charges, their investigation by ONLR and an agency determination of “probable cause” to believe that an employer or other has violated the Act, and issuance of right to sue letters, and complaints to the Labor Commission by individuals or ONLR. The procedures generally mirror EEOC investigations, determinations, and conciliation efforts under Title VII of the U.S. Civil Rights Act of 1964. The Navajo Nation Supreme Court held, in a complaint brought by a Hopi employee, that any person can make a charge under the Act.*

#### Labor Commission Hearing:

When a written complaint is filed, the Commission must schedule a hearing within 60 days. There are provisions for notice, hearing procedures and a decision. The Commission also has its own hearing rules. The burden of proof to show “just cause” for an employment action is upon the employer. *Comment: The Navajo Nation Supreme Court struck down the provision that the employer’s burden proof is “substantial evidence” as violating due process of law, and the Court established the burden as the normal civil preponderance of evidence, where the employer must show that it was “more likely than not” that there was just cause.*

- The Commission can grant a broad range of remedies, including:
  - Remedial orders such as directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, corrective action, and, on a finding of an intentional violation, the imposition of civil fines. Liability for back-pay or other compensatory damages will not accrue for a period beyond two years prior to the date of the filing of the original charge with ONLR. Attorney fees for an individual suit are permitted if the respondent’s position was not substantially justified. An individual with a Commission ruling may enforce it in the Navajo Nation District Court. *Comment: The Navajo Nation Supreme Court has ruled that the fee rate for attorney fees is to be established by the fees charged by attorneys in the Navajo Nation judicial district and not the region. The Court declined to define what “substantially justified” means.*
- Any party may appeal a Commission decision to the Navajo Nation Supreme

Court and seek a stay of execution from the Commission. There is a provision for an appeal bond.

- A non-Navajo who is legally married to a Navajo is entitled to preference in employment upon proof of marriage by a valid marriage certificate. The non-Navajo spouse must have resided within the Navajo Nation for a continuous one-year period prior to an application for Navajo preference. This is a secondary preference to Navajos, so that first preference is given to Navajos, second to spouses of Navajos, third to other Indians, and fourth to non-Indians.
- No person may require an employee to take a polygraph examination as a condition for obtaining employment or a condition of continuing employment.
- The Human Services Committee of the Navajo Nation Council may promulgate rules and regulations to implement and enforce the Act. IT can adopt rules of procedure and practice for hearings.
- All prior inconsistent laws are appealed.
- There are provisions for the effective dates of the Act and amendments and severability.

Chapter 9 of Title 15 has only two child labor provisions:

- The Navajo Nation will adhere to applicable child labor laws in Arizona, New Mexico and Utah on work projects in those portions of the Navajo Nation, and the President of the Navajo Nation is authorized to promulgate additional protective regulations with respect to child labor. *Comment: A cross-reference note in the published version of this chapter points out that the Human Services Committee has been given the authority to adopt labor regulations. One of the issues in Navajo Nation housing legislation is the problem of federal demands for the adoption of legislation on short notice where the Navajo Nation Council has adopted state law by reference. That is a poor practice, and normally, foreign legislation should not be adopted by reference because of unique economic and social needs and cultural differences. The problem is balancing the time and cost of considering new legislation with immediate needs and federal restrictions.*

The Navajo Nation has a lengthy and detailed scheme in its law. The Navajo Nation statutes began with ATERO” legislation, such as that reviewed above, and the code evolved into a general labor code. The Navajo Nation Supreme Court has ruled that the NEPA is in fact a general labor code. Aside from setting Navajo preference standards, the NEPA establishes standards for the conditions of labor. Some are general, such as broad prohibitions against “discrimination” and “harassment.” The Act gives broad rulemaking authority for broad provisions to be fleshed out, but in the absence of rulemaking, the Navajo Nation Supreme Court is

fine-tuning the Act in written opinions. The legislation clearly separates investigative and adjudication functions between agencies, and there are detailed due process procedures. The Navajo Nation Supreme Court has noted the similarity in the Act's procedural provisions with those of Title VII of the U.S. Civil Rights Act of 1964. The difference is that under Title VII, when the EEOC issues a determination, there is a right to sue letter which permits individual charging parties to file suit in a federal district court. In the Navajo Nation scheme, litigation is in the Navajo Nation Labor Commission. The procedures are time-consuming, and they require a large agency infrastructure. In practice, it takes a great deal of time before right to sue letters are issued, and many are issued when the ONLR is unable to investigate the charge within the statutory time periods.

Some of the issues posed by the NEPA which are being addressed in litigation include Navajo Nation jurisdiction over employers doing business on fee land within the Reservation, jurisdiction over state and other non-Navajo Nation governmental entities, the viability and validity of Navajo preference rather than general Indian preference, and various due process-fairness in procedure issues. One policy problem which may rise to a civil rights issue (i.e. bills of attainder) is the practice of appointing elected Navajo Nation Council delegates to the Labor Commission to sit as adjudicators. In sum, however, the Navajo Nation code is different from the codes above because it is a general labor code and not simply Indian preference legislation. The Hoopa Valley Tribe's code addresses general labor standards for government employees, but the Navajo Nation code establishes them for all employers.

## 10. Oglala Sioux Tribe Tribal Employment Rights Office Code

The Oglala Sioux Tribe has TERO legislation, codified in Chapter 18 of its Code, and separate personnel policies and procedures, codified in Chapter 17. Only the TERO legislation will be reviewed here, because tribal personnel policies for government employees are similar to general American internal personnel policies. The “Tribal Employment Rights Office” code has the following provisions:

There is a lengthy declaration of policy which identifies the economic and social needs of the Oglala Sioux Tribe of the Pine Ridge Reservation and the need to address employment discrimination. The preamble references Title VII of the U.S. Civil Rights Act of 1964, the exemption for businesses giving Indian preference on or near an Indian reservation, Indian Self-Determination and Education Assistance Act regulations, and the regulations of the Office of Federal Contract Compliance Programs.

The authority for the code is based in Article IV, Section AI et seq. and Article V, sections 1 and 2 of the Constitution of the Oglala Sioux Tribe.

- The relevant definitions include:
  - “Commerce” includes all trades, traffic, distribution, communications, transportation, provisions of services, manufacturing, production, agricultural production, building, maintenance, construction, banking, mining, and energy resources production.
  - An “employee” is any currently working employee, an applicant for employment, or an employee whose work has ceased as a consequence of a labor dispute or an unfair labor practice. It does not mean an individual employed in domestic services with a family or person in a home or any person employed by someone who is not an “employer.”
  - An “employee on the Pine Ridge Reservation” is any employee who is in a non-managerial or non-supervisory position who spends in excess of one-tenth of working hours “on” the Pine Ridge Reservation. It also means any employee in a supervisory or managerial position who spends in excess of one-twentieth of working hours per month or per pay period, whichever is the lesser, “on” the Pine Ridge Reservation.
  - An “employer” is any person or entity who engages in commerce through compensated agents or servants, or who is hired for contracts for services, within the exterior boundaries of the entity acting as a contractor or subcontractor of an employer, directly or indirectly. It does not include the United States, a wholly-owned government corporation, or any state or its political sub-division, but it does include independent contractors or subcontractors of the United States or a state

or its political subdivision.

- A “covered employer” is any employer who employs two or more employees within the exterior boundaries of the Pine Ridge Reservation with a contract for \$2,500 or more.
- An “Indian” is any individual who is an enrolled member of an Indian tribe.
- An “Indian tribe” is any tribe, band, or other organized group or community which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians. *Note: This is a broad provision which includes groups other than “recognized” tribes, because some individual Indians who are members of “unrecognized” tribes are eligible for some programs and services because of their individual status as an “Indian.”*
- A “certified Indian-owned firm or entity” is any commercial, industrial, or other business firm or entity where 50% or more of ownership and actual management and control is exercised by an Indian or Indians.
- “Indian preference” means that Indians who are residents within the exterior boundaries of the Pine Ridge Reservation, without regard to tribal affiliation, must be given employment preference over non-resident Indians in employment, training, contracting or subcontracting, and that Indians -resident or non-resident- must be given preference over non-Indians in employment, training, contracting and subcontracting. *Note: This is a different approach to the tribal preference-general Indian preference dichotomy. That is, rather than require preference for tribal members, the preference is for residents of the Reservation over non-residents.*
- A “resident Indian” is any Indian who, on the date of any contract is let or an employment offer is made, has been a bona fide resident of the Pine Ridge Reservation for not less than 60 days.
- A “nonresident Indian” is any person who is not a “resident Indian.”
- A “non certified Indian owned firm or entity” is a commercial, industrial, or other business firm or entity with less than 51% of ownership or control.
- A “union” is any organization, association, or combination of skilled workers, which is organized to secure favorable wages, improved labor

conditions, improved hours of labor, and righting grievances brought against employment.

The code applies to all lands situated within the exterior boundaries of the Pine Ridge Reservation, as defined in Article I of the Oglala Sioux Tribe Constitution, and any other lands, within or outside those boundaries, which may be subject to the jurisdiction of the Oglala Sioux Tribe under any law of the United States. *Note: This may refer to the controversial issue of lands which are covered by treaty.*

- Covered employers must:
  - Give preference to resident Indians over nonresident Indians.
  - Grant preference to Indians over non-Indians in hiring, promotion, training, and all other elements of employment.
  - Grant preference to certified Indian-owned firms, with a principal place of business within the Reservation, over certified Indian-owned firms with a principle place of business outside the boundaries, in awarding contracts and subcontracts.
  - Employers must grant preference to certified Indian-owned firms, without regard to location, over non-certified firms with some Indian ownership, in awarding contracts and subcontracts.
  - Employers must give preference to non-certified firms with some Indian ownership with principal places of business within the Reservation over non-certified firms with some Indian ownership, regardless of the place of the principal place of business.
  - Employers must give contracting and subcontracting preference to non-certified firms with some Indian ownership, regardless of their principal places of business, over non-Indian-owned firms.

There is a Tribal Employment Rights Office with the general authority to implement the Indian preference policy with the specific duty of the “daily implementation” of this Ordinance. There is a Tribal Employment Rights Office to prosecute claims of noncompliance before the Tribal Employment Rights Commission.

The Director of the Office has the authority, duties, and responsibilities to:

- Develop and maintain a register with the names of Indian-owned firms certified for Indian preference by the Commission, and an identified of the respective areas of work for which the firms are considered

qualified.

- Develop and maintain a coordinate plan with the Pine Ridge Agency of the Bureau of Indian Affairs to disseminate the certificate register to all appropriate covered employers.
- To develop and maintain a plan to disseminate this Ordinance and any rules, regulations or guidelines of the TERO Commission, to all covered employers and all governmental entities letting contracts within the exterior boundaries of the Reservation.
- To ensure compliance with the Ordinance and any regulations.
- To enter into negotiations with employers to resolve, on an informal and voluntary basis, any claim of noncompliance.
- To inspect non-privileged information in the books and records of employers to ensure compliance with the law.
- To conduct on-site inspections at any time during the actual operation of the business for monitoring and compliance.
- To review Indian preference applications and conduct investigations on qualifications and submit an analysis and recommendations to the Commission.
- To initiate proceedings before the Commission to suspend or revoke an Indian preference certification of a firm when changed circumstances warrant.
- To monitor and ensure the collection of employment rights fees.
- To secure additional funding from alternative sources.
- To implement and maintain a Tribal hiring hall form for employers to select and employ qualified Indians.
- To establish minimum numerical hiring goals and timetables with the minimum number of qualified Indians an employer must employ, by craft, skill area, or job classification.
- To require employers to establish and maintain job training or apprenticeship programs to assist Indians to become qualified in



various crafts skills areas or job classifications.

- To prohibit employers from instituting and using job qualification criteria or personnel requirements which are barriers to the employment of Indians, unless the criteria are required by business necessity.
- To enter into negotiated agreements with unions to ensure union compliance with the Ordinance.
- To work in conjunction with federal agencies with regulations which provide for Indian preference in employment and contracting to coordinate Indian preference requirements, monitoring, and sanctioning activities.
- To assume the power of the Tribal Employment Rights Commission in emergency situations or under exigent circumstances.
- To take other actions or engage in other activities to achieve the purposes and objections inherent in the policy of Indian preference in employment and contracting.

There is a Tribal Employment Rights Commission, as follows:

- The Commission has five members who are appointed by the Tribal Council. One of the members must be a member of the Tribal Council. The terms of office is at the pleasure of the Tribal Council.
- The Commission has the general authority to implement and policy of Indian preference, and it has the specific authority to:
  - Establish and implement rules and regulations for all activities and procedures of the Commission;
  - Issue rules, regulations, and guidelines to implement the Ordinance;
  - Meet with the TERO Director and staff on a monthly basis to receive updates on the operation of the TERO Office;
  - Hold formal hearings, issue notices of hearing, subpoena witnesses and documents;
  - Impose any sanctions and grant any relief as authorized and prescribed in the Ordinance;

- Require covered employers to pursue corrective actions to come into compliance with the Ordinance;
  - Take other actions and engage in other activities to achieve the purposes and objectives of the Indian preference policy.
- There is an employment rights fee for covered employers of 5 of the total gross contract price per contract.
- There is a complaint and hearing procedure which provides:
  - Any person who believes that another has failed to comply with the Ordinance can file a written complaint with the TERO Office, whether or not that person suffered personal harm as a result of noncompliance.
  - Upon the filing of a complaint, the TERO Director must give written notice of the alleged noncompliance to the person against whom the allegation is made. The TERO Director must meet with that person in three days from the receipt of the notice to attempt to achieve a voluntary, information resolution of the matter through negotiation. If a resolution cannot be achieved at the end of a three day period, the Director must notify the Commission and request that it set a date for a formal hearing.
  - Upon the receipt of a request for hearing, the Commission must give written notice of a hearing, which advises each interested person of the person against whom the allegation has been made, the complainant, the TERO Director, and all other identified interested persons of the date, time and location of the hearing. The notice must advise each interested person of the nature of the hearing, the right to be present and participate, the right to present testimony and evidence and cross-examine, and the right to be represented by counsel at one's own expense. The Commission can issue subpoenas and direct the TERO Director to assist the complainant in presenting the claim.

There are rules of procedure which must be "recognized and adhered to," including:

- Each notified interested person has the right to be present at and participate in the hearing;
- Each has the right to present relevant sworn testimony and documentary evidence;

- There is a right to call witnesses and to cross-examine other witnesses;
- There is a right to counsel;
- The Chairman of the Commission must preside;
- Formal rules of evidence or procedure are not followed, but the Commission “shall proceed to ascertain the facts inherent in the matter in a reasonable and orderly manner;”
- There must be a complete transcript of proceedings;
- The Commission can continue hearings;
- The burden of proof is a preponderance of evidence. *Note: This does not indicate who bears the burden of proof. Customarily, the burden is upon the person who makes the accusation;*
- The Commission must issue a decision within three days of the date of the conclusion of the hearing.

The Commission can impose sanctions for noncompliance.

- The Commission can impose any one or a combination of sanctions for noncompliance, including:
  - A civil monetary fine of up to \$500 per violation, with each day of noncompliance constituting a separate violation;
  - Suspension or termination of the right to conduct business, with a reasonable period of time to remove equipment and other property and to arrange the assumption of outstanding contractual obligations with another person;
  - Prohibition of the future conduct of business within the Reservation for a definite or indefinite period;
  - Monetary or other appropriate relief as damages to compensate any person harmed by noncompliance;
  - An order for the immediate termination of any individual hired in contravention of TERO Indian preference requirements;

- An order for the immediate rescission of any contract or subcontract entered into in violation of TERO requirements;
- An order to employ, promote, or train any Indian individual adversely affected by noncompliance;
- An order to award a contract or subcontract to a qualified Indian-owned firm adversely affected by noncompliance;
- Order the award of back pay to adversely affected individuals;
- Order an employer to make changes in policies, procedures or conduct to secure compliance;
- If no appeal is filed within 21 days of a Commission decision, and the parties has failed to pay damages or comply with orders, the Commission may order the tribal police to confiscate, and hold for sale, such property as is necessary to ensure payment or compliance. The police have the authority to sell the property 30 days after confiscation and notice;
- The Commission can grant such other or further relief or sanctions that the Commission deems just and property. *Note: This can be a troublesome power if a lay body levies penalties which are excessive.*

Publication of the ordinance:

- Publication includes actual publication, “directing” copies to employers and government agencies, and a requirement for the TERO staff to ensure that all bid announcements issued by governments and other agencies comply.
- Employers must make written reports to the TERO Office as required by it, except for confidential information for valid business purposes. All written materials maintained by the TERO Office are “strictly confidential,” and the Office and its staff must maintain confidentiality.
- The TERO Director and staff and members of the Commission have the right to conduct periodic on-site inspections during the time of actual operation of the business to monitor compliance. They have the right to speak with a contractor, subcontractor, or employee on the site so long as the conversation does not interrupt business.
- Employers who intend to do business within the Reservation must first consult with the TERO Director and staff regarding Indian preference and the employer’s obligations.

- If an employer intends to enter into a collective bargaining agreement with a union, that employer must ensure that the agreement includes preference requirements, and the agreement is subject to the TERO Director's approval.
- Oglala Sioux Tribe police officers are authorized and directed to take reasonable enforcement actions to enforce cease and desist and related orders that are issued by the Commission, and Commission orders do not require an accompanying or affirming judicial order.
- Employers must accommodate the religious beliefs, traditions, and practices of Indian employees and Indian-owned firms. Comment: There are cultural considerations to doing business in Indian Country, including accommodating religious practices, such as leave for ceremonies and other religious events. This is an important provision.
- No person shall harass, intimidate or retaliate against the TERO Director, any staff member, or any member of the Commission. The TERO Director may issue a warning, describing the prohibited conduct, and request a formal hearing before the Commission if the warning is disregarded.
- Guidelines issued by the Commission are incorporated in the Ordinance by reference.
- Commission rules and regulations are subject to review and comment by interested persons who reside within the Reservation, the Commission must:
  - Publish proposed rules and regulations once in every newspaper with a principal place of business within the Reservation;
  - Receive written comments for 20 days following publication;
  - At the same time, the Tribal Council must review and discuss comments;
  - The Council then does a final review of the proposed rules and regulations, with consideration of changes based upon the comments, and approve and adopt the rules and regulations.
  - The adopted rules and regulations are forwarded to the Secretary of the Interior for review and approval. *Note: The secretarial approval requirement is a matter of local law and a governing tribal constitution. Under most constitutions with secretarial approval, council resolutions must be approved. That does not apply, however, to delegated rulemaking power so long as the delegation is approved by the Secretary.*

- There are severability, time for coverage, and effective date provisions.

There is a Wage and Hour Enforcement Office within the Tribal Employment Rights Office which has the authority to establish Tribal Wage Rates for employees of construction projects, which can establish by regulation a method of surveying the wage rates throughout the Great Sioux Nation as established by the Treaty of 1868, and the TERO Director has the authority to issue wage and hour determinations in accordance with the Wage and Hour Enforcement Office's regulations. The Commission has the authority to enforce wage and hour determinations and decisions using the same procedures as the TERO Ordinance. Future contracts for the construction, repair, modification, or enhancement of property will be issued without first submitting a copy of the plans, specifications, advertisement for bids, general and special conditions, and instruction to bidders to the TERO Office at least 30 days prior to bid opening.

While this is a fairly standard ordinance, compared with the others reviewed above, it is unique in the way it addresses employee religious freedom and its method for setting prevailing wages for construction. There is an extensive statute to guide the Office of Navajo Labor Relations, but this statute vests the authority to set prevailing wages to a special office, with the authority to make regulations. That may be a more flexible way to satisfy the new provisions of NAHASDA, because there will be certain difficulties and issues about the method to set prevailing wages in the future, and the ability to establish a methodology by regulation allows for flexibility and prompt action.

## **11. Stockbridge-Munsee Tribe Employment Rights Ordinance**

While most of the codes reviewed thus far are "TERO Ordinances" which focus upon Indian preference in employment, the Stockbridge-Munsee Employee Rights Ordinance is an example of a general labor code. Its provisions are:

A preamble which addresses the maintenance of peace and good order and the regulation of economic activities, and which recognizes the need to create laws to govern and protect its employees, "especially where state and federal laws do not apply."

The purpose of the ordinance is to address differences between employees and supervisors, protect employee rights, including a stable working environment, the right to file grievances, and seek assistance to solve on-the-job problems through established policies and procedures. The Tribe defines and establishes employee rights and a grievance process to give an opportunity to have recourse for their grievances.

There are several definitions, including:

- A "corrective action" is documented oral warnings, written warnings,

probation or suspension;

- To “discriminate” is to refuse to hire, to terminate or to treat a person differently with respect to promotion, compensation or other terms and conditions of employment;
- An “employee” is any individual or appointee hired or appointed by the Stockbridge-Munsee Community or a subordinate organization;
- The “employee handbook” is the “Information Handbook for Employees of Mohican Nation” which was effective on October 1, 1996, or any successor document adopted by the Tribe;
- “Established policies and procedures” are the policies, guidelines and procedures in the Employee Handbook and its inserts or any resolutions or ordinances adopted by the Tribal Council;
- “Exempt employees” are employees who are exempt from the overtime pay provisions of the Tribal Fair Labor Standards Ordinance. Exempt employees are paid a salary and do not earn overtime pay for hours worked over 40 hours per week;
- “Nonexempt employees” are all employees who are not exempt employees;
- An “orientation period” is a period of up to 120 days during which employees are subject to “rigorous performance evaluations;”
- “Political appointees” are employees hired by the Tribal Council to serve at the pleasure of the Tribal Council. They are high level executive positions that are so vital to the execution of the Council’s policies that the Council must be free to entrust the positions to individuals who enjoy the Council’s complete confidence. Political appointments are not subject to the employment posting policy;
- “Probationary employees” are employees who have not successfully completed the orientation period;
- “Reasonable accommodation” means reasonable modifications or adjustments to the work environment or the manner or circumstances under which a position is customarily performed, that enable a qualified person with a disability to perform the essential functions of the position if such accommodation does not cause the Tribe, or an employing agency, undue hardship. “Reasonable accommodation” does

require measures that would result in an expenditure of tribal funds;

- “Restricted duty” means restrictions on an employee’s hours or work duties that temporarily prevent the employee from performing all essential job duties but to not prevent the employee from performing some essential duties, provided that the restrictions are recommended by a physician, subject to a review by a physician selected by the Tribe;
- “Sexual harassment” means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. In includes conduct directed by a person at another person of the same or opposite sex.

The basic rights of all employees cover the following areas:

- Unemployment compensation;
- Basic human rights in regard to age, sex, disability, race, creed, religion, political affiliation, national origin, color, sexual orientation, marital status and ancestry. Employees shall not be discriminated against in these basic rights, provided that:
  - This shall not infringe on the right of the tribal government to discriminate based on tribal political affiliation with respect to political appointees;
  - It is not a violation to treat a person differently based on disability if the disability prevents the person from adequately performing all essential job duties and no reasonable accommodation is available;
  - It is discrimination based on sex to discriminate based on pregnancy, childbirth, maternity leave or related medication conditions; and
  - It is not a violation to discriminate based on sex where sex is a bona fide occupational qualification.
- Employees are entitled to leave benefits consistent with the federal Family Medical Leave Act unless superseded by a tribal act;
- While the Council has the sovereign right to bar labor union organizing from the reservation, it recognizes the right of employees to meet during nonworking hours to discuss their common interests in regard to employee workplace issues



and concerns without threat of retaliation or dismissal;

- Employees are entitled to compensation vacation time, sick time, funeral leave, National Guard and reserve call-up time, as provided in established policies and procedures;
- An employee unable to vote during nonworking hours has reasonable time off with pay to vote in tribal, federal, state or local elections, in according to established policies;
- There is a guarantee of equal pay for men and women doing the same job;
- All types of sexual harassment are prohibited, and all employees shall be treated with courtesy, respect and dignity;
- Employee privacy will be protected in:
  - Safeguards from unauthorized use of personnel records, including background investigations:
  - Interview boards will maintain full confidentiality of information given during their involvement in the hiring process;
  - Employees may review and copy their personnel files except for (a) records of possible criminal offenses, (b) letters of reference for the employee, (c) materials used for staff management, (d) information that would invade another person's privacy, or (e) records relevant to a pending claim between an employer and the employee;
  - No employee will be subjected to random drug testing more than three times in any twelve month period, except for employees with a previous positive finding in a drug test or employees under suspicion of drug use;
- Any Employees Assistance Policy (AEAP") in effect at the time of employment will be enforced. Employees who fail "related testing procedures," including those for medical problems, will be provided treatment under the EAP, if the employee has not been guilty of conduct that merits termination;
- Employees must not be retaliated against, harassed or dismissed when they report violations of any rules, regulations, laws, ordinances, or policy at any level of government or employment to the tribal government;
- Employees cannot be terminated from employment without just cause; and

- Established personnel policies shall reflect these listed rights.

There are other rights which are not subject to grievances, including:

- The Tribal Fair Labor and Standards Ordinance;
- Workers Compensation and Disabilities, as adopted by the Tribe;
- A safe work place, including buildings, environment, equipment, safe work practices and safety education and training;
- A required enforcement of policies to protect workers from harassment and sexual harassment, such as threats, intimidation, physical or verbal abuse, from co-workers or non-employees during working hours.

There are different classes of rights for purposes of appeal: Some rights are appeal able to the Tribal Court, and other issues are handled in internal grievance process in the Employee Information Handbook. An employee must exhaust internal grievance process before a Tribal Court appeal is available. Where there is a termination, an employee may waive the internal grievance process and file a claim with the Tribal Court. The Human Resources Director may waive exhaustion of the internal grievance process upon a showing that it would not further the process of resolving the problem.

An employee must initiate the internal grievance process or court action within 30 calendar days of the event or events that give rise to the employee's claim.

The court procedures are:

- A petition can be in any written format, but must include this information:
  - Name and address of the petitioner;
  - An identification of which rights have been violated;
  - A brief description of the facts and events that gave rise to the alleged violation, including the names of potential witnesses and the name of the petitioner's supervisor;
  - A specific request for relief.
- The employer must file a written answer within 20 days.
- After the answer is filed, the court must schedule an informal conference to discuss

preliminary matters, including scheduling, motions, discovery and whether there is a possibility of settlement.

- At trial, the petitioner has the burden of proof to show a violation by a preponderance of evidence.
- Upon a finding of credible evidence that a violation has occurred, the court can order back pay up to one year's wages, reinstatement, or any other non-monetary remedy tailored to remedy the violation.
- There is a Tribal Peacemaker Ordinance, which can be used in employment disputes.

There is a separate Stockbridge-Munsee Employee Preference Policy Ordinance, in Chapter 54 of its Code, which provides:

- The purpose of the ordinance is the optimum employment of Indian people in the Community, and their spouses or related family members, to build self-sufficiency, sovereignty and an economy that combats poverty and social ills, and assures that the Community receives the maximum benefits generated by its entities and enterprises. Discriminatory employment practices must not be tolerated. The purpose of the ordinance is to provide maximum employment opportunity and preference in hiring, promotion, transfer, training, lay-offs, interim appointments and all other aspects of employment.

The relevant definitions are:

- An “employee” is any person paid wages, salary, or stipend by the Community or any of its entities and enterprises;
- “Employer” means the Community, its subdivisions, entities and enterprises, and it also includes the Mohican Housing Authority;
- “Preference” means people will be employed according to a priority listing as long as they meet the qualifications of the job description or job announcement;
- “Meet qualifications” mean that the applicant or employee possesses the skills, education, experience or other job-related requirements in the job description or job announcement;
- “Enrolled Member” means a person who is officially enrolled;
- “Direct Descendant” means any person whose biological father or biological mother is an enrolled member;

- “Spouse” means the legally married spouse of an enrolled member;
- “Other Indian” means any person who is enrolled in a federally recognized or state recognized Indian tribe, or any Tribe recognized by the Stockbridge-Munsee Tribal Council.

#### Establishing Preference

- Preference must be given when it is established that the employee or applicant meets the qualifications in the job description or announcement. If that person has the qualifications, he or she is eligible for the position and shall not be denied if another person at a lower preference has higher qualifications than those necessary for the position. If more than one person on the same preference level meets qualifications, the decision-makers have discretionary power. Job qualification requirements which are not necessary to the position and which act as barriers to employment preference are prohibited.

The order of preference for hiring, promotion, transfers, training, lay-offs, interim appointments, and all other aspects of employment is:

- Enrolled member;
  - Direct descendant;
  - Spouse;
  - Other Indian.
- The ordinance applies to all entities, enterprises, and organizations operating under the Community.
  - The Ordinance is enforced by the Human Resources Department or hiring agencies. When an employee is hired, the hiring committee or official must complete an “Employment Preference Compliance Report,” and it must be completed and signed by the appropriate Human Services Director.
  - This ordinance is to be read with the Employee Rights Ordinance to give the employee or applicant the maximum benefits of both. If there is any dispute or conflict in the language and provisions of the ordinances, the dispute must be resolved in favor of the employee or applicant.
  - There is an effective date.

- The remedies include suit in the Tribal Courts by employees or application. Money damages are not available in any suit, and the sole remedy is appointment to the job, promotion, transfer, or interim appointment that was denied as the result of a violation. The complainant may also be given a similar unfilled position if one is available. A complaint must be filed in Tribal Court within five business days of receipt of notice that the applicant did not receive the position.

These are unique statutes. The Employee Rights Ordinance is largely civil rights based, and it incorporates separate personnel policies by reference. The Employee Preference Policy Ordinance is restricted to tribal employment programs. There is reference to a casino and casino employment in the Preference Policy Ordinance.

## **12. Tlingit-Haida Tribal Employment Rights Ordinance**

Title 7 of the Tlingit-Haida Code covers the Tribal Employment Right's [sic] Office. It provides that:

- The Central Council creates the ACCTHITA Tribal Employment Rights Office (TERO)" as a section of the Employment and Training Division, and:
- The TERO Officer is appointed by the Manager of the Employment and Training Division, subject to approval of the President.
- The Office can issue rules, regulations and guidelines, as approved by the Council, for employment rights.
- "Native organizations" with five or more employees, operating "within the exterior boundaries of the Central Council communities," are required to give Indian preference, and they are required to comply with the rules, regulations and guidelines of the TERO Office.
- Employers with collective bargaining agreements must secure written agreements from unions to comply with the Indian preference law.
- An employer that does not abide by the law are subject to sanctions, including the denial of the right to commence business, the suspension of operations, the denial of the right to conduct further business, and the payment of back pay or other relief.

The TERO Officer may:

- Impose numerical hiring goals and timetables, and specify the minimum

number of “Natives” an employer must hire, by craft or skill level;

- Require participation in training programs;
- Establish a tribal jobs pool and require that no employer may hire a non-Native until the jobs pool has certified that no qualified Native is available to fill the vacancy;
- Prohibit employment criteria that are barriers to Native employment unless they are a business necessity;
- Make agreements with unions;
- Require preference in the award of subcontracts;
- Establish counseling programs;
- Take other actions necessary to achieve the purposes of the law.
- There is a provision for cooperative agreements with federal employment rights agencies.
- There is provision for an employment rights fee.

This is an unusual law, it that it binds “Native organizations” only, using the usual TERO model, but we do not know what a “Native organization” happens to be.

### **13. Turtle Mountain Band Tribal Employment Rights Office**

The Turtle Mountain Band of Chippewa Indians is unique among the various Indian nations, because several years ago, it commercially published (Allen-Smith Company) a code which is essentially a version of the Field Code, a codification of English-American common law which was also adopted by California, Montana and North Dakota. It appears, however, that the Turtle Mountain Band is separately publishing other, more specific, subject matter statutes. Among them is the Tribal Employment Rights Ordinance. It provides:

General provisions and purpose:

- This is the Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance.
- There is a policy to promote employment opportunities for Indians and business opportunities for Indian firms and contractors and provide direction,

management and business standards for the Reservation. The tribal work force must have an opportunity to gain employment on or off reservation through preference in harmony with congressional enactments giving Indians special employment rights.

Definitions:

- Employers may seek clarification on all TERO requirements and definitions at a pre-bid conference for any on-reservation construction project or by directing inquiries to the TERO Commission.
- An “employer” is any person, business, company, contractor, subcontractor, or other entity located or engaged in work on the reservation, employing one or more persons, without regard for whether the employer or its owner is Indian or non-Indian or a tribal member or not. The term excludes federal, state, county and tribal government. Tribally-owned or tribally-chartered private, for profit corporations, are employers. Tribally owned or tribally chartered nonprofit corporations are also employers. Indian organizations under the Indian Self-Determination and Education Assistance Act are employers. Tribally owned corporations are also employers.
- A person is “engaged in business on the reservation” if, in connection with any portion of a business enterprise or specific project, contract or subcontract, the employer or any of its employees or agents perform work within the exterior boundaries of the reservation. Employers with both on-reservation and off-reservation business locations are subject to TERO in their off-reservation locations of they are on lands adjacent to the reservation.
- An “Indian” is any person recognized as an Indian by the United States Government pursuant to its trust responsibility. The recognized preferences are for (1) Indians residing in Rolette County, North Dakota; (2) Indians residing in other counties in the State of North Dakota; and (3) any Indian recognized by the U.S. government pursuant to its trust responsibility wherever residing.
- “Residence” or “residing” mans the place of domicile of the applicant at the date of seeking employment or contracting preference, and resides within 90 days of the application. Domicile is the place where an individual has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.
- An “Indian-owned business” is a business entity (in whatever form) that is at least 51% owned by a federally recognized Indian Tribe or by Indians, which has been screened and certified by the MBE/WBE office or the Indian Business Development Center in Bismark, North Dakota. Note: The statute does not

define what an AMBE/WBE” office is or describe the two programs.

- An employer is “located on the reservation” if doing business or performing work within the exterior boundaries of the reservation.
- The “Reservation” is the Turtle Mountain Reservation proper and all tribal land and trust property held by the U.S. Government for the Tribe in Rolette County, North Dakota, including all land within the exterior boundaries and the tribal land and trust property. *Comment: The wording of this definition does not tell us the precise land status involved here. It tells us that all “tribal land and trust property” in Rolette County is included, and that would likely refer to lands held in trust for the tribe and individual allotments. They’re many individual off-reservation allotments in that region.*
- A “key position” is an ongoing position where a person is a permanent employee for a period of one year prior to the contact and it is vital to the contractor’s ability to perform the contract as he bid it, or to the special operation of a crew familiar with each other in their duties to be performed. *Comment: This is a different statement of the “core crew” exemption to Indian preference hiring that is frequently a problem. The difficulty lies in the definition of a contractor’s bona fide employees who have already been working for a period of time, and workers the contractor relies upon to regularly complete contracts.*

The Turtle Mountain Chippewa Tribal Employment Rights Commission:

- The Commission is made up of one council member (with an alternate council member) appointed by the Council and four members appointed by the Council at large from the reservation community. The Council appoints the chairman.
- Commissioners hold office for two years.
- A commissioner may be removed by the Council upon conviction of a crime, gross neglect of duty, misfeasance of malfeasance in office, ineligibility to serve, or for missing three consecutive meetings without good cause. Specific written charges must be given ten days before a Council hearing for removal, and the commissioner has an opportunity to answer the charges before action.
- If a commissioner dies, resigns, is incapacitated, leaves the reservation, or is removed from office, the Council must appoint an eligible person to fill the vacancy for the remaining term of office.



- The Commission has the general duty to administer the employment rights program in accordance with the Ordinance.

The Commission's powers are to:

- Establish rules and regulations for the activities of the Commission, with the approval of the Council;
- Set a minimum wage scale for construction employment at the beginning of each calendar year;
- Expended appropriated funds;
- Obtain funding from federal, state or other sources;
- Impose numerical hiring goals and timetables, specifying fair minimum number of Indians an employer may hire by craft or skill level;
- Promote employer-training programs to increase the pool of Indians eligible for employment;
- Assist the TERO Director in administering a tribal hiring hall;
- Require that an employer may hire non-Indians for non-key positions only after the hiring hall has certified that qualified Indians are unavailable to fill vacant positions;
- Prohibit employers from using job qualifications criteria or personnel requirements that bar Indians from employment unless they are required by business necessity;
- Enter into agreements to insure union compliance with the Ordinance;
- Give preference to tribal and Indian-owned business in the award of contracts or subcontractors;
- Establish counseling programs to assist Indians to retain [sic] employment.
- Hold hearings and subpoena witnesses and documents;
- Require employers to submit reports and take actions deemed necessary for the fair and vigorous implementation of the Ordinance;

- Enter into cooperative agreements with federal employment rights agencies to eliminate discrimination against Indians;
- Take such other actions as are deemed necessary to achieve the purpose and objectives of the Ordinance.

Turtle Mountain Chippewa Tribal Employment Rights Program:

- All employers are required to give preference to equally qualified Indians in hiring, promotion, training, and all other aspects of employment, contracting and subcontracting. That applies only to facilities or components or divisions of an employer located on or engaged in business on the reservation, or for employers with both on-reservation and off-reservation. Those employers are also subject to the TERO in their off-reservation locations, if they are on lands adjacent to the reservation.
- Indian preference is binding on all contractors, subcontractors, and minority businesses, regardless of tier. The TERO Commission is responsible for insuring that they comply with the requirements.
- The Commission must establish the minimum number of Indians each employer should employ during any year that he or any employees are located or engaged in work on the reservation. There must be numerical goals for each craft, skill area, classification, etc. used by an employer, including administrators, supervisory and professional categories. The goals must be expressed in terms of number of Indian employment as a percentage of the total man-hours worked by the employer's workforce in the particular job classification. Numerical goals must be based on surveys of available Indian manpower pool and of projected employment opportunities. New employers must meet with the Director or the Commission as long before actually beginning work as possible and give the Commission a list of the number and kind of employees expected to be employed. The Commission and Director must then set specific goals and timetables for the employer, and the employer must agree to meet the goals in writing. For existing employers, the goals are set as a percentage of new employees expected to be employed in the coming year. The Commission must review goals every year to reflect changes in the number of available Indians or changes in employer hiring plans. Employers must submit monthly reports. If the Commission or the Director has reason to believe that an employer is violating the Ordinance by not meeting goals, the Commission or the Director may file a complaint. The Commission has the initial burden of proving that the employer has failed to meet its goals. Upon proof of such a failure, the employer has the burden of proving that it has met or is meeting its goals or has made a good faith effort to meet its

goals. There is no excuse that the employer has a collective bargaining agreement and the union has failed to refer Indians.

- Employers must participate in training programs to assist Indians to become qualified in the employer's various job classifications. Employers must employ the maximum number of Indian trainees or apprentices' possible. The Commission can set a ratio of trainees to qualified workers in consultation with the employer. The number of Indian trainees in construction projects must be one trainee for every four journeymen. Employers with a collective bargaining agreement with a union but get an agreement by the union to establish an advanced journeyman upgrade and apprenticeship program.
- Employers are prohibited from using job qualification criteria or personnel requirements which bar Indians from employment. The Commission has the initial burden to show that a job qualification or criterion is not required by business necessity. Upon prima facie proof that a given qualification or criterion is not necessary, the employer has the burden to prove that it is.
- The Commission must establish and administer a tribal hiring hall. An employer may recruit from any source by the process it chooses, but an employer may not hire a non-Indian until it gives the Commission or Director a reasonable time to locate a qualified Indian and the tribal hiring hall has certified that a qualified Indian is unavailable.
- The Commission must establish counseling and support programs to assist Indians to obtain employment. Employees must cooperate with the Commission for such programs.
- Every employer must give preference in the award of any contract or subcontract to Indian-owned businesses, and their names must be supplied to employers for their use. Employers must take every step feasible to identify or locate Indian-owned businesses. A 10% preference will be given to qualified Indian owned businesses in Rolette County.
- No Indian worker may be laid off or terminated in a reduction in force if a non-Indian worker in the same job classification is still employed, unless the termination is under a lay-off procedure previously agreed to by the Commission in writing. A non-Indian must be terminated first if the Indian has the minimum qualifications for the job classification.
- Indians must be given preferential consideration for promotions, and they must be encouraged to seek them. When a supervisory position is filled by a non-Indian, the employer must file a report with the Commission on

efforts to inform Indian workers of the position, what Indians applied, and why any Indian was not hired.

- Employers must give Indian students preference for summer student employment, and employers must make best efforts to promote after school, summer and vacation employment for Indian students.

Fee Assessment:

- Contractors, subcontractors, and business entities with a negotiated contract of \$10,000 must pay a one-time fee of 3% of the total amount of the contract. This applies to construction contractors, manufacturers, material men and suppliers. A 3% fee also applies to professional services, A/E [architectural and engineering] firms, consultants and legal services, regardless of dollar amount.
- Fees paid to the TERO Office are to be placed in the general account for the Council to appropriate for use by the Commission.
- Any person, employer, or vendor doing business in the reservation must obtain and maintain a tribal business license before commencing work. Licenses are issued annually.

Every union with a collective bargaining agreement with an employer must file a written agreement it will comply with the Ordinance. An employer may not commence work on the reservation until the agreement is filed with the Director or the Commission.

- Every union agreement must provide that:
  - The union will give absolute preference to Indian residents in job referrals;
  - The union will cooperate with the Commission or Director;
  - The union will allow Indians to register for job referral lists by telephone or mail;
  - The union will establish a journeyman upgrade and advanced apprenticeship program;
  - The union will include all Indians who qualify for journeyman or apprenticeship status and wish to join the union;
  - The union will grant temporary work permits to Indians who do

not wish to join the union.

- Employers will provide a model union agreement for use by unions.
- This Ordinance is not a waiver of sovereign immunity.

Complaints and hearings:

- The Commission or Director, an individual employee, or a union may request a hearing, in which case written notice of a hearing must be given to all parties concerned of the nature, time and place of hearing and the evidence to be presented. The notice must advise the parties of their right to be present and to present testimony and other evidence, the right to be represented by counsel at their own expense, and that the Commission may be represented by the tribal general counsel.
- If the Commission or Director believes that an employer, contractor, subcontractor, or union has failed to comply with the law, they may file a complaint and notify the party of the alleged violations. The Commission or Director must attempt to achieve an informal settlement, and if that cannot be achieved, the Commission or Director may request a hearing.
- If an Indian believes an employer has not complied with the law, or believes that he or she has been discriminated against for the fact of being an Indian, that person may file a complaint in writing with the Director, specifying the violation. The director must then investigate and attempt to achieve an informal settlement. If that cannot be done, the individual or the Director may request a hearing. Retaliation for exercising such rights is prohibited.
- If an employer or union believes that any provision of the law or an order that is illegal or unclear, it can file a complaint with the Director. The Director must investigate and attempt an informal settlement, and if that cannot be achieved, the employer, a union, or the Commission may request a hearing.

The rules for hearings are:

- All parties may present testimony and other evidence and may be represented by counsel at their own expense;
- The Commission must tape proceedings and preserve all tapes, pleadings and physical evidence, which are the record for any appeal;

- The Commission may have the advice and assistance of the tribal general counsel;
- The Chairman or Vice Chairman must preside, and formal rules of evidence do not apply, but the Commission shall proceed to ascertain the facts in a reasonable and orderly fashion;
- Any matter to be proven must be established to the satisfaction of the Commission or the preponderance of the evidence. Note: The “satisfaction of the Commission” standard instead of the civil preponderance rule could lead to accusations of bias or the lack of a fair hearing;
- A hearing can be continued at the discretion of the Commission or Director;
- The Commission may take immediate action or take the matter under consideration at the conclusion of the hearing;
- The Commission or Director must notify the parties of its decision in 30 days;

The Commission can issue subpoenas;

- A party leaving a scheduled hearing will be subject to entry of an adverse finding by default, unless authorized by the Commission;
- Any party who does not appear for a scheduled meeting will be subject to an adverse finding by default unless the absence was approved by the Commission;
- Complaints must be filed with the TERO Office within 30 days of the incident.

The penalties for violation are:

- Denial of the right to commence or continue business inside the Reservation or adjacent tribal land;
- Suspension of all operations inside the reservation;
- The payment of back pay to compensate any injured party;

- An order to summarily remove an employee hired in violation of the law;
- Monetary civil penalties;
  - A prohibition from engaging in any future operations on the reservation;
  - An order requiring employment, promotion and training of Indians injured by violations;
  - An order for changes in procedures or policy necessary to eliminate the violation;
  - An order for any other provision to eliminate the violation;
  - There is a maximum penalty of \$500 for each violation, and each day a violation exists is a separate violation;
- The Commission or Director may apply to the Tribal Court for an order to enforce any final Commission order.
- There is a right to appeal a Commission decision to the Tribal Court. The Court of Appeals (with a law trained judge presiding) has the jurisdiction to reverse, affirm or modify any Commission decision if the order was not supported by substantial evidence or the decision was clearly erroneous as a matter of law.
- The Tribe must appropriate funds as necessary and available to establish training programs to prepare tribal members for job opportunities.
- The Commission or Director must notify all employers of the Ordinance and obligations to comply. All bid announcements must have language that the successful bidder will be obligated to comply with the law. The Tribal Council may issue business licenses to employers. The Director must send a copy of the Ordinance to every employer operating on the reservation.
- No new employer may commence work until it has a license and consulted with the Commission or Director and developed a plan to meet its obligations under the Ordinance.
- Employers must submit reports and other information to the Director or Commission. The Director has the right to make on-site inspections during regular working hours to

monitor compliance, and the right to inspect and copy relevant records. All information collected by the Director is confidential unless disclosure is required for a hearing.

- One section sets out a tribal minimum wage scale for various occupations, subject to revision.
- There is a severability section.
- The Indian preference requirements set by the Ordinance are separate and apart from federal Indian preference requirements. *Comment: One of the dangers of basing tribal law on federal statutes or incorporating federal statutes or regulations by reference is that there may be unfavorable changes or judicial interpretations other than what the tribe intends. This is a good provision to prevent federal court decisions in separate civil rights-discrimination cases from binding the tribe.*
- Where there is a construction contract of \$500,000 or more where the Tribe or the Turtle Mountain Housing Authority or any other tribal agency or instrumentality solicits bids, there are special rules:
  - Where the entity soliciting bids has a project team to oversee the project, the TERO Director will be a non-voting member of the team during the pre-bid and construction phases of the project.
  - Where there is such a team, it must approve numerical goals and there can be no enforcement proceeding unless it is cleared with that team.
  - The TERO Office or tribal legal counsel must answer all written requests for pre-bid interpretations of TERO requirements.
  - All day-to-day TERO office functions continue to apply to such projects.

This is another example of what might appear to be a “boilerplate” TERO law, but there are significant minor changes and additions in this law, as there are in the others. This ordinance also suffers from a lack of clarity in the duties of the Commission and the TERO director, would could be the basis for a claim of the lack of a fair hearing or pre-adjudication bias by the Commission.

#### **14. Umatilla Tribe Employment Rights Ordinance**

The Umatilla Employment Rights Ordinance provides that:



Definitions:

- An “employer” is any person, company, contractor, subcontractor, or other entity located or engaged in work on the Reservation, or other entity engaged in work on the Reservation. The term also includes state, county, tribal, and contractors of all governmental agencies.
- An employer is “engaged in work on the Reservation” if during any portion of business enterprise or a specific project, contract, or subcontract, he or any of his employees spends a majority of time performing work within the exterior boundaries of the Reservation on a continuing basis.
- An “Indian” is any person recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.
- An “Indian-owned business” is a business entity of which at least 51% is owned by Indians.
- “Located on the reservation,” means that if during any portion of a business enterprise or specific contract or subcontract, he maintains a temporary or permanent office or facility within the exterior boundaries of the Reservation.
- The term “reservation” means the Umatilla Indian Reservation, Oregon.

Umatilla Tribal Employment Rights Office:

- The director is appointed by the Tribal Chairman with the approval of the Tribal Board. The director has the authority to hire staff, expend appropriated funds, and seek other funds. The Office has the authority to issue rules, regulations, and guidelines to implement employment rights, hold hearings, subpoena witnesses and documents, require employers to submit reports, and take other action for the fair and vigorous implementation of the ordinance.

Umatilla Employment Rights Program:

- All employers operating within the exterior boundaries must give preference to Indians in hiring, promotion, training, subcontracting, and all other aspects of employment, and comply with Indian preference laws.
- An employer with a collective bargaining agreement must work with the

Office to obtain a written agreement from the union that it will comply with Umatilla Indian preference laws. The agreement is subject to the approval of the Office. An agreement is not official recognition or sanction of any union.

- Any employer who fails to comply with the law or fails to obtain necessary agreements from a union is subject to sanctions, including: denial of the right to commence business, fines, suspension of the employer's operation, termination of the operation, denial of the right to conduct further business, payment of back pay or other relief to correct any harm done, and summary removal of employees hired in violation of law.
- The Director can impose sanctions after giving the employer an opportunity to present evidence showing why it did not violate the law or why it should not be sanctioned. An employer can appeal a decision by the Director imposing sanctions to the Commission.

The Employment Rights Office is authorized to:

- Impose numerical hiring goals and timetables to specify the minimum number of Indians an employer must hire, by craft or skill level;
- Require employers to establish or participate in training programs to increase the pool of qualified Indians as quickly as possible;
- Establish a tribal hiring hall and impose a requirement that no employer may hire a non-Indian until the hiring hall has certified that no qualified Indian is available;
- Prohibit any employer from using qualification criteria or personnel requirements that serve as barriers to Indian employment unless the employer can show that the criteria are required by business necessity;
- Enter into agreements with unions to insure union compliance;
- Require employers to give preference in the award of subcontracts to tribal and other Indian-owned firms and entities;
- Establish programs of counseling and support to Indian workers to assist them to retain employment. Employers may be required to participate in or cooperate with such programs;
- Take other action as necessary to achieve the purposes and objectives

of the law.

- The Office is authorized to enter into cooperative relationships with federal employment rights agencies to eliminate discrimination against Indians on and off the Reservation. The Office must investigate the feasibility of establishing a tribal FEPC and entering into a formal relationship with the EEOC. *Comment: This provision is unusual, because it recognizes that there are state fair employment practice agencies or human rights commissions and that the EEOC contracts with them to hear federal discrimination cases. This section authorizes the possibility of a Umatilla agency with an agreement with the EEOC.*
- The program can charge employers an employment rights fee of one-half of one percent of the total amount of a construction contract (a one-time fee). Employers with gross sales of \$50,000 or more must pay a fee of one-half of one percent of its annual payroll. The fee does not apply to educational, health, governmental, or non-profit employers.
- The Tribal Employment and Training Program (CETA) and the BIA Employment Assistance Program must devote resources to preparing Indians for job opportunities.
- If any provision of the ordinance is held invalid, the remainder will remain in force.

#### Tribal Employment Rights Commission:

- There is a Tribal Employment Rights Commission.
- There will be five Commission members, appointed by the Board of Trustees. Members hold office for two years, and there is no limit to the number of terms a commissioner may serve.
- Any person 21 years or older who works or resides “on” the Reservation is qualified to be a commissioner.
- The commission elects a chair annually, and the Chair presides at all meetings and is authorized to sign required documents.

The Commission conducts hearings on tribal employment rights matters and it also has the following powers:

- To elect a chairman and to recommend removal of a member of the

Commission;

- To establish rules and regulations governing the Commission's activities;
- To take other actions consistent with the Ordinance;
- The Commission can hold formal and informal meetings and regulate its procedures. Where possible, consensus is required for Commission decisions. If consensus cannot be achieved, the affirmative vote of at least five commissioners is required. At least two commissioners must sign written agreements or plans, directive complaints, and appeals. The Commission cannot supervise TERO personnel. *Comment: Surely there must be a mistake in this section. If the Commission is composed of five commissioners, and consensus would be among all five, then why is a vote of five commissioners required absent consensus? The authority of two commissioners to take certain actions is not clear. The prohibition against the Commission supervising TERO personnel properly separates adjudication and quasi-legislative functions from the investigatory and enforcement agency.*
- A commissioner may be removed by the Board of Trustees for good cause after notice and a hearing. If a commissioner dies, resigns, be incapacitated, become disqualified or removed from office, there is a vacancy and the Board must fill the unexpired term. Missing three consecutive meetings is a ground for automatic removal.

Scope of Commission Hearings:

- Any action of the TERO Director may be appealed to the Commission.
- Any person appealing a sanction of the Director must file a written statement with the Commission, with a copy to the Director, within seven days of the receipt of the Director's decision. The statement must describe the nature of the Director's action and the relief requested of the Commission.
- The Director has two weeks from the day the appeal is received by the Director to respond to the statement in writing.
- On receipt of the response, the Commission must set a date, time, and place of hearing and notify all concerned parties. Parties are responsible to insure that witnesses attend the hearing.

### Commission Hearing Procedure:

- The hearing will be opened promptly and at the time specified.
- Requests for delay must be in writing to the Commission three days prior to the hearing date.
- The complainant presents his or her case first.
- Only the complainant, respondent, Commission, and the witness being examined and the recorder will be allowed in the hearing room at any one time. Parties may have an attorney present, but only as an advisor. The attorney may not cross-examine. Comment: The normal due process canon of administrative law is that individuals have the right to counsel in hearings. There may be a civil due process right to cross-examine witnesses.
- Both parties have the opportunity to present opening statements.
- Parties (not their lawyers) may examine and cross-examine witnesses, and the Commission will be flexible and informal with evidentiary matters and procedural questions.
- Written testimony is permitted into evidence when a witness cannot appear. When a party wishes to use written testimony of a witness who cannot appear, there must be an advance request and an explanation of the non-appearance. Affidavits are permitted, and a signed but unsworn statement may be admitted into evidence only “under unusual circumstances” and when the Commission is satisfied that the testimony cannot be obtained otherwise.
- Testimony is under oath or affirmation.
- Closing statements must be permitted.
- The presiding official may:
  - Administer oaths or affirmations;
  - Rule on offers of proof;
  - Limit the number of witnesses when testimony would be

unduly repetitious;

- Exclude persons from the hearing for contemptuous misbehavior that obstructs the hearing.
- The Commission must render a decision within ten days of the date of the appeal.
- Hearings will be recorded, but any person wishing a transcript must bear its costs.

#### Enforcement of a Commission Order:

- The Director may file a petition in the tribal court to seek:
  - Enforcement of all or part of a Commission order that has not been appealed;
  - Enforce all or part of any court order issued on appeal.
- A petition must contain all pertinent facts about the order, including a copy of the order, and state which parts of the order must be enforced and against whom, set forth facts to show how the order is not being obeyed. The Director must serve the parties.
- On receipt of a petition, the court must set a hearing and subpoena all necessary parties. A hearing must be held within ten days from the date of filing
- The Director has the burden of proof to show that the order has not been complied with.
- The court must render a decision on the petition at the close of hearing and enter whatever order is necessary or appropriate.

#### Appeals to Tribal Court of Appeals:

- Any action of the Commission may be appealed to the Tribal Court of Appeals, and appeals are on the record.
- An appeal must be filed within fourteen days from the date of receipt of the Commission decision, it must be in writing, and it must set forth what issues are being appealed and the grounds for the appeal.

- The appellant is responsible for the costs of a hearing transcript. The court must review the hearing record and it may render its opinion with or without oral arguments or written briefs.

Penalties for Violation:

- The penalties include:
  - Denial of the right to commence or continue business inside the reservation;
  - Suspension of operations inside the reservation;
  - Payment of back pays and damages to compensate an injured party;
  - An order to summarily remove an employee hired in violation of law;
  - Monetary civil penalties;
  - A prohibition in engaging in future operations on the Reservation;
  - An order requiring changes in procedures and policies to eliminate the violations;
  - An order requiring employment, promotion and training of Indians injured by the violation;
  - An order making any other provision necessary to alleviate, eliminate or compensate for any violation.
  - The maximum penalty is \$500 per violation, and each day during which a violation exists is a separate violation.

Emergency Relief:

- If the Director feels that immediate and irreparable injury, loss or damage will result before the Commission or Court of Appeals is able to act, the Director may file a motion for a temporary restraining order with the Tribal Court.
- The motion must state the nature of the injury, loss or damage expected to result

and why relief is necessary to prevent immediate and irreparable consequences, and specify the type of relief requested.

- The court must rule upon the motion within 48 hours of filing, excluding weekends.
- The Director is responsible to notify the employer of a court hearing and will serve notice on the employer.
- The Director must prove to the court that a temporary restraining order is justified.
- After the hearing, the court must grant or deny the motion.
- A temporary restraining order is effective for thirty days, after which it must be renewed or superceded by an order of the Commission after a full hearing or after a decision by the Court of Appeals.

There is a separate section for the Umatilla Human Rights Office, which provides:

**Director:**

The Director is appointed by the Tribal Chairman, subject to the approval of the Board of Trustees. The Director can hire staff, expend appropriated funds, obtain and expend other funds, and the Office has the authority to issue rules, regulations, and guidelines to implement employment rights, hold hearings, subpoena witnesses and documents, require employers to submit reports, and take other action for the fair and vigorous implementation of the Ordinance.

**Coverage:**

Guidelines are binding on employers. An “employer” is any person, company, contractor, subcontractor, or other entity that is located or otherwise engaged in work on the Reservation. The term “employer” also includes state, county and tribal agencies and contractors or subcontractors of a governmental agency.

**Publication:**

The obligation of all employers to comply with tribal employment rights requirements must be made to known to all employers. Bid announcements issued by tribal, federal, state or other private or public entity must contain a statement that the successful bidder will be obligated to comply with “these guidelines.”

Other agencies engaged in contracting must inform employers of their obligations



and send copies to every employer.

#### Specific Indian Preference Obligations of Covered Employers:

- The office must establish the minimum number of Indians each employer must employ during any year its employees work on reservation. Numerical goals must be set by craft, skill area, job classification, etc. and include administrative, supervisory, and professional categories. Goals must be expressed in terms of man-hours of Indian employment as a percentage of total man-hours of the work force in that classification. The goals must be realistic and be based on surveys of available Indian manpower and projected employment opportunities.
- Goals must be established for the entire work force of new employers. The employer must meet with the Office as much before beginning work as possible, and the employer must complete an employment opportunity survey to provide a list of the number and kinds of employees it projects it will need. The Office will then set specific goals and timelines for that employer. They must be incorporated into its plan for complying with the law, and the employer must agree to meet the goals.
- The goals must be reviewed by the Office at least once a year and revised as necessary to reflect changes in the number of Indians available or changes in the employer's hiring plans. The employer must submit monthly reports indicating the number of Indians in its work force, how it is meeting its goals, monthly hires and fires, and other information.
- Each employer must meet its minimum goal or demonstrate it has made best efforts to meet its goals. The Office may issue a note of non-compliance based upon the reports and other evidence, or if there is reason to believe that the employer is not meeting or making a good faith effort to meet its goals. An employer is entitled to a hearing within ten days of receipt of the notice.
- All employees will participate in training programs to assist Indians to become qualified in the various job classifications used by the employer. Employers in construction must employ the maximum number of trainees or apprentices possible. The Office can set a ratio of trainees to qualified workers, and in construction, that number shall be no less than the minimum ratio established by the Department of Labor.
- Employers with collective bargaining agreements must work with the Office to obtain written agreements from all unions which state that the union will comply with Indian preference requirements before the employer is permitted to commence work. The union must agree to give absolute preference to Indians

in referral, cooperate with the tribal hiring hall, and establish mechanisms so Indians do not have to travel great distances to retain their place on union lists, etc.

- An employer may use no job qualification criteria or personnel requirements which serve as a barrier to the employment of Indians which is not required by business necessity. The burden is on the Office to show that a given requirement is a barrier, and the burden is then on the employer to demonstrate that such criteria are requirement is a business necessity. Employers must also make reasonable accommodation to the religious beliefs of Indian workers.
- An employer may recruit and hire from any source by the process he chooses, but he may not hire a non-Indian until he has exhausted the supply of applicants referred by the tribal hiring hall and has given the Office reasonable time to locate a qualified Indian. Any non-Indian worker who was employed in a job that was not cleared through the hiring hall procedure is subject to summary removal.
- The Office must provide counseling and support services to Indians who are employed, and employers must cooperate with those services.
- Employers must give preference to tribally owned or Indian-owned firms and enterprises in subcontracts. An Indian owned firm is one that is qualified as such under BIA Self-Determination regulations. The Office must maintain a list of such firms.
- No Indian worker will be terminated in a layoff or reduction in force if a non-Indian worker in the same craft is still employed. The non-Indian will be terminated first so long as the Indian meets the threshold qualifications for the job. If the layoff is by crews, qualified Indians will be transferred to crews that will be retained so long as there are non-Indians in the same craft employed elsewhere. The seniority of non-Indians will not justify the Indian preference requirements.
- Indians will be given preferential consideration for promotions and employers will encourage Indians to apply. When a supervisory position is filled by a non-Indian, the employer will file a report stating what Indians applied, the reasons they were not given the job, and what efforts were made to inform Indian workers of the opportunity.
- Indians shall be given preference in hiring summer student help. Employers must make every effort to promote after-school, summer and vacation employment for Indian youth.

#### Subcontractors.

- Indian preference requirements are binding on all subcontractors and are deemed to be part of subcontract specifications. The employer must insure that all subcontractors comply with these requirements

#### Compliance plans:

- New employers cannot commence work on the reservation until they have met with the Office and developed an acceptable plan to meet its obligations.

#### Reporting and on-site inspections:

- Employers must submit reports and other information requested by the Office. The Office has the right to make on-site inspections during regular hours and inspect and copy relevant records. It can interview employees on the job site. Information gathered by the Office is confidential, unless required for a hearing.

#### Compliance and hearing procedures:

- If the Director believes an employer (including a subcontractor) has failed to comply, he or she must notify the employer in writing, specifying the violations. The employer can request a hearing within ten working days from the date of receipt of the notice. If the Director determines the employer is out of compliance and has not made a best effort to comply, he or she must impose sanctions and order the employer to take corrective action.

#### Sanctions:

- The sanctions for non-compliance include:
- Monetary fines;
- Suspension of employer operations;
- Termination of the employer's operation;
- Prohibiting the employer from future operations on the reservation;
- Requiring the removal of certain workers or prohibiting the hiring of certain workers;
- Back pay, employment, promotion, training or other relief to Indians who were

harmed;

- Requiring changes in procedures as necessary for compliance.

#### Appeals:

- An employer has the right to appeal any decision of the Director to the Commission. A Commission decision may be appealed to the Umatilla Tribal Court.

#### Individual complaint procedure:

- Any Indian, group of Indians, or representative of a class of Indians who believes an employer has failed to comply, or who believe they have been discriminated against as Indians, may file a complaint with the Office, whether or not they were personally harmed. Upon receipt of a complaint, the Office must investigate and attempt an informal settlement. If that cannot be achieved, the Director must hold a hearing and make a determination of the validity of the charge. If there is a finding of non-compliance or discrimination, the Director must grant relief to make the complainant whole.
- If an employer or union believes any provision, rule, or order is illegal or erroneous, it may file a complaint with the Office. Upon the receipt of a complaint, the Office must investigate and attempt to conciliate. If that cannot be done, any party may request a hearing.

#### EEOC Deferral Status:

- The Office is authorized to enter into a cooperative relationship with federal employment rights agencies, such as the EEOC or OFCCP. The Office must look into the feasibility of a formal relationship with the EEOC as provided in Section 706 of Title VII of the 1964 Civil Rights Act.

#### Compliance fee:

- Every contractor or subcontractor with a contract of \$50,000 or more must pay a one-time fee of one-half of one percent of the contract amount.
- Every employer with gross sales of \$50,000 or more must pay an annual fee of one-half of one percent of annual payroll. The fee is not required of education, health, or non-profit organizations.

The Umatilla Employment Rights Ordinance is an example of the “standard” TERO law.

## 15. White Mountain Apache Labor Code

The White Mountain Apache Tribe has a labor code with general provisions, a minimum wage chapter, and unemployment and workers compensation programs. Those chapters provide:

### Chapter One: General Provisions -

The purpose and intent of the law is to:

- Provide right to Indians to use because jobs in private employment on or near the Fort Apache Indian Reservation are an important resource;
- Enforce the unique and special employment rights of Indians;
- Protect Indians under federal laws to combat employment discrimination; and
- Establish an employment rights program and office to use the law and powers to increase the employment of Indians and eradicate discrimination against them.

The pertinent definitions are:

- An “employer” or “non-tribal employer” is any non-tribal government employer or contractor doing business on the Fort Apache Indian Reservation, including tribal member employers, but not including the government, its operations, departments or enterprises.
- “Indian preference” means priority in order of enrollment, being an Indian spouse of an enrolled member, or being an “other Indian.” For Indian Self-Determination Act programs, the order of preference is being a “local Indian and other Indians. *Comment: This provision attempts to separate employment under federal programs, with “general Indian” requirements in regulations (particularly those of the OFCCP) from general employment so that tribal preference is stated as “local Indians,” and there is tribal preference for other employment. This distinction takes into account the realities that on many Indian reservations, non-member Indians are a small percent of the population.*

There is a White Mountain Apache Tribe Labor Relations Department, which is an “independent office” which reports to the Director of Administration and Finance. The Director is appointed by the tribal chairman, with the general authority to administer the program, obtain and expend funding, issue rules, regulations and guidelines, hold hearing, subpoena witnesses and

documents, require employers to submit reports, and take other action for fair and vigorous implementation of the law.

- All non-tribal employers operating within the exterior boundaries of the Reservation are required to give preference to Indians in hiring, promotion, training and other aspects of employment.
- Employers with a collective bargaining agreement with a union must obtain an agreement that the union will comply with the law. The agreement is subject to the approval of the Department.

The Department has the power to:

- Impose numerical hiring goals and timetables to specify the minimum number of Indians to be hired, by craft or skill level;
- Require employers to establish or participate in training programs;
- Coordinate the establishment of a tribal hiring hall and to require that no employer may hire a non-Indian until the hiring hall certifies that there is no qualified Indian available for a vacancy;
- Prohibit employers from using qualification criteria or personnel requirements that are barriers to Indian employment unless the employer can demonstrate that the criteria or requirements are required by business necessity. The Department must adopt the EEOC guidelines on those matters, and it can impose its own additional requirements;
- The Department can enter into cooperative relationships with federal employment rights agencies.
- There is an employment rights fee of one percent (one time) of the total amount of a construction contract, and every employer with five or more employees, or with gross sales of \$15,000 or more, must pay a quarterly fee of one percent of quarterly employee payroll. The fee does not apply to education, health, governmental or non-profit employers or tribal utilities franchises.

The sanctions for non-compliance include:

- Denial of the right to commence business;
- Fines;

- Suspension of the employer's operation;
  - Termination of the employer's operation;
  - Denial of the right to conduct any further business
  - Payment of back pay or other relief to correct any harm;
  - Summary removal of employees hired in violation of the law;
- Sanctions are imposed by the Labor Relations Officer after notice and an opportunity to present evidence. There is an employer right of appeal to the tribal court.
- All reservation employment and training functions (including JTPA and the BIA Employment Assistance Program) must devote necessary resources to prepare Indians for job opportunities. The Labor Relations Officer must coordinate with the Director of the Tribal Personnel Office to identify job openings, definitions of skill levels and training requirements. The Tribal Personnel Office must develop and maintain a "skills bank" or inventory of unemployed Indian workers.
- Tribal governmental operations, departments and enterprises must also give preference to qualified Indians in hiring, promotion, training and all other aspects of employment. On request, tribal employers must submit a report to the Department which includes a description of all employees as to (1) number of employees who are enrolled members, (2) number of Indian employees who are spouses of enrolled members, and (3) number of Indian employees who are not enrolled or married to a member. Complaints of non-compliance by a tribal hiring authority can be made to the Labor Relations Officer to file a grievance on behalf of the employee, or the employee can file a grievance. No grievance can be brought to the Tribal Council until all administrative remedies have been exhausted and there is a final determination by the Grievance Committee. The Department does not have adjudicative authority, regulatory powers, or control over tribal governmental operations or employment procedures.

## Chapter Two: Minimum Wages --

- The purpose and intent of this chapter is to protect and stabilize the wages employed on the Reservation, and to provide employees with "some measure of adequate remuneration for their labor and to provide them with a certain standard of living rather than to receive compensation which often may be uncertain and fluctuating." This is also done to increase job stability and the



stability and unity of families for economic well being.

- The relevant definitions are:
  - The “minimum wage” is \$3.35 per hour and the “prevailing minimum wage as increased from time to time pursuant to the (federal) Fair Labor Standards Act, but no other exemptions or provisions of the Federal Wage and Hour Law shall apply to construe or interpret this minimum wage standard.

*Note: This definition does not address Davis-Bacon requirements.*

- This chapter applies to any employer who engages in business within the exterior boundaries of the Reservation, and such employers must pay the minimum wage of \$3.35 per hour and increases as established by federal law.
- This chapter does not apply to livestock associations, youth camps employing minors under age 16, and other employers the Council may declare to be exempt.
- The Tribal Employment Rights Office must conduct a survey of compliance for all employers, and the Labor Relations Department has the authority to issue rules, regulations, and guidelines to implement this chapter, hold hearings, subpoena witnesses, require reports and take other actions for fair and vigorous implementation.
- All employers must comply with those rules, regulations and guidelines.

The sanctions for non-compliance include:

- Denial of the right to commence business;
- Civil penalties;
- Suspension of employer operations;
- Termination of employer operations;
- Denial of the right to conduct further business; and

- The payment of back pay to correct any harm or injury suffered by an employee.
- In addition to those sanctions, there is liability for a civil penalty of \$150 to \$500 for a first offense, or \$500 to \$1,000 for a second offense. Where there is a willful violation, the employer must pay the aggrieved employee treble the amount of wages wrongfully withheld. Willful violators may be excluded from the Reservation. Retaliation is prohibited.

#### Chapter Three: Unemployment Benefits --

- Any person making a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase a benefit or other payment under Arizona law or an employment security act of another jurisdiction, for self or another, may be punished by a fine of \$25 to \$200, 60 days imprisonment, or both. Each false statement or failure to disclose a material fact is a separate offense.
- If the Tribal Court finds fraud resulting in the payment of benefits to which the person is not entitled, that person is liable to repay the amount to the Commission or have that sum deducted from future benefits.

#### Chapter Four: Workers Compensation --

- The Tribe adopted as tribal procedure and law the worker's compensation laws and rules of the State of Arizona, and any amendments.
- All references in Arizona laws and procedures to "local authorities," State of Arizona, "Superior Court," "Industrial Commission" or related agencies shall mean the corresponding agencies of the Tribe.
- The tribal judge may request a visiting judge and an administrative law judge to hold hearings, as necessary.
- Prior inconsistent laws are repealed.
  - This chapter is not a waiver of sovereign immunity.
  - Upon the filing of a petition or complaint, the Tribal Court must forward a copy to the tribe's worker's compensation carrier within five days of filing.
  - This chapter must be interpreted "consistent with tribal governmental

structure and organization and Arizona State Court decisions.

This labor code essentially adopts an abbreviated version of the “standard” TERO law, without a TERO commission; it establishes a minimum wage and ties that wage to federal minimum wage standards; it establishes a tribal criminal penalty for violation of applicable unemployment compensation programs; and it adopts the Arizona worker’s compensation law, as construed by the State, for tribal worker’s compensation claims. While it is difficult for an Indian nation to prepare and adopt complete codes of law, and there are reasons for “domesticating” state laws to promote local control, it is a dangerous practice for one sovereign to link its laws to the interpretations of another.

## CONCLUSION

These summaries of fifteen Indian nation labor codes are raw material. They are designed to serve as a database for an analysis of the “best practices” among them and the core of an outline for a uniform or model Indian nation labor code. This material, along with an analysis of the most current trends in Indian affairs law, guidance from international human rights standards, and checklists of the terms of state labor codes, will help guide analysis and the formulation of an outline.

\* \* \*

[Federal Register: September 10, 1996 (Volume 61, Number 176)]  
[Notices]  
[Page 47787-47791]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr10se96-124]

[[Page 47787]]

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Part II

Department of Health and Human Services  
Indian Health Service

Department of Housing and Urban Development

Department of the Interior  
Bureau of Indian Affairs

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Interdepartmental Agreement on Indian Housing Program; Notice

[[Page 47788]]

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing  
[Docket No. FR-3763-N-02]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Interdepartmental Agreement on Indian Housing Program

AGENCIES: Offices of the Indian Health Service (HHS); the Assistant Secretary for Public and Indian Housing, (HUD); and the Bureau of Indian Affairs, (Interior).

ACTION: Notice of Interdepartmental Agreement.

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SUMMARY: This notice announces an Interdepartmental Agreement which sets forth the guidelines by which HUD, the Bureau of Indian Affairs, and the Indian Health Service will coordinate their efforts in the delivery of services and financial assistance to Tribes and Indian Housing Authorities.

EFFECTIVE DATE: September 10, 1996.

FOR FURTHER INFORMATION CONTACT: Dominic Nessi, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, Room B-133, 451 Seventh Street, SW, Washington, DC 20410; telephone (202) 755-0032. Hearing- or speech-impaired individuals may access this number by calling the Federal Relay Service TTY at 1-800-877-8339. (With the exception of the ``800'' number, these are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. September 2, 1994 Notice of Proposed Interdepartmental Agreement

On September 2, 1994 (59 FR 45702) HUD published a notice which proposed to set forth the working relationship among HUD, the Bureau of Indian Affairs (BIA), and the Indian Health Service (IHS) in the delivery of services to Tribes and Indian Housing Authorities (IHAs) in conjunction with the planning and construction of new housing developed with financial assistance of HUD's Indian housing program.

The Interdepartmental Agreement (IA) establishes a general foundation for this cooperative effort and guidelines by which each of the three agencies will interact with Tribal governments and IHAs. The IA will be supplemented, as necessary, by individual Memorandums of Agreement (MOA) developed between local decision makers and the specific Federal agencies assisting in the development of the housing.

The BIA Housing Improvement Program (HIP) was eliminated from this IA to streamline the agreement among all signatory agencies in the development of HUD Indian housing programs. It is anticipated that the IHS and the BIA will be addressing the BIA-HIP separately. Other sections pertaining to program procedures are more appropriately covered in the program handbook or program NOFA and have been deleted from the IA.

HUD solicited public comments on the proposed IA. Eight comments were received. The following section of the preamble presents a summary of the comments raised by the commenters, and HUD's responses to these comments.

II. Comments on the September 2, 1994 Notice of Proposed Interdepartmental Agreement

Comment. Two commenters wrote that proposed section 5.2.1 of the IA, which concerns the construction of access roads, should be revised to clarify that the BIA ``has responsibility for access roads which provide public access to cluster sites only and not private access to individual sites which the BIA is prohibited from constructing.''

Response. HUD has adopted the comment by revising section 5.2.1 to exclude individual homesites from the access road construction requirements.

Comment. One commenter wrote that the language in proposed section 5.2.1 granting the BIA a lead time of 2\1/2\ years in the construction of access roads should be revised. The commenter believed that ``in the 2\1/2\ year interim, the `temporary' access road built by the IHA becomes unacceptable as there is a void of responsibility for constructing a permanent access road. The BIA should be required to pick up these roads immediately after the IHA has completed the project.''

Response. HUD has not revised the IA as a result of this comment. Due to budgetary prioritization, the 2\1/2\ year time-frame is necessary for BIA to complete its part of the project.

Comment. Two of the commenters urged that the IA provide for greater coordination in National Environmental Policy Act (NEPA) compliance efforts. One of the commenters recommended that section 7.0 be revised to specify that each signatory agency will follow procedures

in a manner which will avoid or minimize delays and that timelines for compliance will be included in time schedules worked out at the project coordination meeting. The other commenter suggested that the IA permit the designation of a lead agency ``in performing NEPA compliance where the project encompasses the functions of all [three] agencies.'' The commenter believed this would expedite the development of a project by eliminating ``multiple comment periods, multiple opportunities for litigation, and multiple FONSI's or EISs.''

Response. Based upon the IHS's recommendation, HUD has revised the IA as a result of these comments. Section 7.0 now provides that in order to minimize delays, HUD, or the Tribal government which has assumed HUD's NEPA responsibility, shall be the lead agency for the preparation of all required environmental statements.

Comment. One commenter wrote that the IA should address land acquisitions since, according to the commenter, ``acquisitions require as much coordination between the BIA and HUD as does development.'' Specifically, the commenter believes the BIA should delegate authority to area offices to approve land acquisitions. Alternatively, the commenter proposed that the BIA designate a person to exclusively review and approve HUD financed land acquisitions. Moreover, the commenter suggested that the IA require NEPA review of these acquisitions.

The commenter also suggested that HUD and the BIA coordinate their acquisition related time requirements. The commenter believed that, due to the time needed by the BIA to take land in trust, some IHAs may not be able to meet HUD's requirement that construction commence within 30 months of a program reservation date. The commenter urged that HUD and the BIA ``negotiate time lines and procedures to avoid these conflicts.''

Response. HUD and the BIA will work more closely in coordinating time requirements.

Comment. One commenter wrote to suggest that proposed section 2.2 of the IA be revised to specify that the BIA will review and approve all Tribal trust, restricted fee and allotted land housing leases in accordance with 25 CFR part 162. Furthermore, the commenter suggested additional language stating that BIA will review and approve all easements to housing sites in accordance with 25 CFR part 169. Lastly, the commenter recommended that proposed section 2.3 be revised to

[[Page 47789]]

require that all housing sites have approved easements and leases before the start of construction.

Response. HUD has adopted the first two elements of this comment. In reference to requiring the IHAs to complete all easements and leases prior to construction, this is a requirement that is inappropriate for this IA since the IA does not encompass the Indian Housing Authorities. This is a requirement that would more appropriately be added to the local Memorandum of Understanding (MOU).

Comment. One commenter objected to the fact that proposed section 2.2 of the IA ``does not specifically state that the BIA is responsible for funding access road construction in HUD assisted housing projects.'' According to the commenter, ``this weakens the BIA's responsibility of supporting HUD-assisted housing projects.''

Response. HUD has not adopted this comment. The IA does not have the force of law, but merely sets forth the coordination efforts of HUD, the BIA, and the IHS. Accordingly, the comment is inappropriate for inclusion in the IA.

Comment. Two commenters objected to the language in proposed section 6.3, IHS PARTICIPATION IN HUD FUNDED SANITATION FACILITIES CONSTRUCTION, which states that the IHS ``may participate'' in the construction of sanitation facilities. According to the commenters ``this statement does not adequately commit the IHS to execute their

responsibility for sanitation system development which servers [sic] Native Americans.'

Response. Based on the IHS's recommendation, HUD has adopted this comment by revising section 6.3 to require that the IHS endeavor to participate in the construction of sanitation facilities.

Comment. One commenter wrote that because the IA's scope is limited to Indian mutual help and low rent programs, it does not go far enough in achieving coordination between the signatory Federal agencies. The commenter recommended that other programs, such as Indian HOME and the BIA Housing Improvement Program (HIP) be included in the IA.

Response. HUD has not revised the IA as a result of this comment. The HOME and HIP programs have different requirements and agency responsibilities. If the coordination of efforts becomes a problem for these programs, separate agreements can be negotiated.

Comment. One of the commenters recommended that language be inserted in section 5.0, DEVELOPMENT OF ON-SITE AND OFF-SITE ROADS, which includes the ``standards of road design and construction that would be required to assure States, cities, counties, townships, etc. assume responsibility for the maintenance and up-keep of roads and streets within the on-site construction area.'' These standards would be in effect when the State and local government have construction and design requirements that exceed ASHTO requirements.

Response. HUD has not revised the IA as a result of this comment. Under 24 CFR 905.250, the IHAs are already required to comply with appropriate local road design standards.

Comment. One of the commenters recommended that the IA specify which agencies are responsible for the costs of complying with Federal, State, or local statutory requirements. Among other examples, the commenter pointed to the costs associated with meeting EPA environmental requirements.

Response. HUD has not revised the IA as a result of this comment. The question of financial responsibility for complying with the various statutory requirements is more properly addressed in the individual MOAs.

Comment. One commenter wrote that the IA was vague concerning IHS duties. The commenter urged that the IA be revised to specify that the IHS has the responsibility of providing water, waste water and solid waste facilities, and O&M infrastructure.

Response. Based on the IHS's recommendation, HUD has adopted this comment by revising section 6.2. This section now details the IHS's statutory authority and responsibility for utilizing HUD funds to provide sanitation facilities for HUD financed Indian homes.

The text of the Interdepartmental Agreement follows:

Interdepartmental Agreement on the Indian Housing Program

The Department of Housing and Urban Development--Office of Native American Programs

The Department of Interior--Bureau of Indian Affairs

The Department of Health and Human Services--Indian Health Service

#### 1.0 Statement of Purpose

The purpose of the Interdepartmental Agreement (IA) is to set forth the working relationship among the Department of Housing and Urban Development (HUD), the Bureau of Indian Affairs (BIA), and the Indian Health Service (IHS) in the delivery of services to Tribes and Indian Housing Authorities (IHAs) in conjunction with the planning and construction of new Indian housing developments. The above agencies share a common goal to assist Tribes in improving their living environment through the delivery of quality housing and infrastructure.

This goal can be more readily achieved with an efficient and integrated utilization of available resources.

This Interdepartmental Agreement establishes a general foundation for this cooperative effort and the guidelines by which each of the three agencies will interact with Tribal governments and IHAs. The IA will be supplemented, as necessary, by individual Memorandums of Agreement (MOA) developed between local decision-makers and the specific federal agencies assisting in the development of the housing.

## 2.0 General Agency Responsibilities

2.1 HUD Responsibilities. HUD will provide financial and technical assistance for the development and management of low income housing and community developments in Indian and Alaska Native areas through the mutual help/low rent Indian Housing Development Program.

2.2 BIA Responsibilities. BIA will provide real estate and transportation assistance to IHAs pursuant to 25 CFR parts 162, 169, and 170. These services may include (i) assistance in preparing appropriate lease documents for housing sites and required easements; (ii) review, approval and recordation of all required trust or restricted fee land lease and easement documents; where resources are available, providing assistance in obtaining real estate appraisals; (iii) development of access roads to housing sites in accordance with the Tribe's road priorities; (iv) providing maintenance services to those IHA constructed roads and streets accepted into the BIA road systems in accordance with 25 CFR part 170; and (v) provision of other support, when available, necessary for the timely development of housing.

2.3 IHS Responsibilities. The IHS provides a comprehensive primary and preventive health services delivery system for American Indians and Alaska Natives. The environmental health component of IHS assists Tribes in the development of Tribal sanitation facilities [water, waste water, and solid waste facilities and operation & maintenance (O&M) infrastructure]. IHS has the primary responsibility and authority to provide Native American homes and communities with the necessary sanitation facilities and related services.

[[Page 47790]]

## 3.0 Agency Coordination

3.1 Processing Procedures. The signatories of the IA agree to maintain timely and relevant processing of regulations, handbooks, notices and other administrative guidance for use by Tribes and IHAs. All signatory agencies will be given an opportunity to comment on such documents before they are made effective.

3.2 Program Administration. The signatories of the IA agree to enforce the provisions of current program guidelines with their respective area/regional offices. Disputes between or among the signatory agencies may be made in writing to the head of the appropriate area or field office involved, with a copy to the other agencies. Unresolved disputes extending more than 90 days beyond the date of submission shall be referred, in writing, to the Headquarters Working Group for resolution. This group is composed of the Director, Office of Native American Programs in HUD; Director, Office of Trust Responsibilities in BIA; and the Director, Division of Environmental Health in IHS.

3.3 Information Sharing. Whenever possible, the signatory agencies will provide, or cause to be provided, copies of housing and supporting infrastructure planning documents, to include utility master plans, transportation plans, and IHA comprehensive housing plans, to the appropriate area/regional offices of other signatory agencies.

HUD Field Offices of Native American Programs will provide



quarterly reports on the progress of HUD's assisted housing projects to BIA and IHS. These reports will indicate the method of construction, project number, and number of units. Scheduled and actual completion dates for applicable project review points will be provided, where available.

3.4 Grant Award. Signatory agencies will provide copies of applicable housing and supporting infrastructure grant/project award notices to the other signatory agencies as soon as practicable after notification to Tribes.

#### 4.0 Development of Housing Units

##### 4.1 HUD Responsibilities.

4.1.1 Applications. HUD will advise IHAs to use BIA and IHS information on existing infrastructure and new construction recommendations to support proposed housing project applications for funding.

4.1.2 Project Coordination. HUD will advise IHAs to use handbooks concerning procedures the IHA may use to determine what assistance they need from the BIA and IHS. At the request of a Tribe through the IHA, the BIA (including Area Road Engineers and Realty Officers) and IHS will provide, to the extent feasible, technical reviews and recommendations on project planning, design and construction documents involving supporting infrastructure, and related requirements at appropriate project review points. Appropriate project review points will be determined on a project by project basis and may include: project coordination schedule review, housing site feasibility review, project plan review, project final inspection, and record drawings review. Schedules or commitments made as a result of project coordination require the approval of the appropriate IHS and/or BIA official.

4.1.3 Standard vs Assisted Housing Development Method. The Standard Method of development refers to all procedures, guidelines and requirements associated with the normal development of an Indian housing project by an administratively capable IHA. The Assisted Method contains all of the procedures, guidelines and requirements associated with the development of an Indian housing development by an IHA which has requested additional HUD assistance due to its inexperience or lack of staff resources, or by an IHA which has been deemed by HUD to need additional assistance, monitoring and supervision during the development process. The Standard Method will require less technical assistance by the signatory agencies as compared to the Assisted Method.

##### 4.2 BIA Responsibilities.

Leases, Easements and Real Estate Appraisals on Trust or Restricted Fee Property. Where resources are available, the BIA will provide real estate appraisals at the request of the IHA. All leases and easements shall be approved by the BIA.

#### 5.0 Development of On-site and Off-site Roads

##### 5.1 HUD Responsibilities.

On-Site Street Construction. HUD will provide sufficient funds for the construction of on-site streets, in accordance with the American Association of State Highway and Transportation Officials (AASHTO) standards. The IHA will have the overall responsibility for construction of on-site streets. The Tribal government must determine the type of streets to be constructed in conjunction with housing projects, and whether the streets will be included in the BIA Roads System for maintenance by the BIA. HUD will advise each IHA and Tribe which receives a HUD Housing Grant that the on-site streets must be designed and constructed to AASHTO standards to be eligible for inclusion on the BIA Roads System.

## 5.2 BIA Responsibilities.

5.2.1 Access Road Construction. When requested by the Tribal government, and when resources are available, the BIA will plan and construct access roads to housing developments, excluding individual homesites. Sufficient lead time is required to develop access roads. This lead time may be as much as 2\1/2\ years. The BIA will coordinate access road construction with the IHA and make every effort to complete such roads prior to the completion of the housing project.

5.2.2 Road/Street Maintenance. IHA-developed streets may be added to the BIA Roads System only when the street(s) and related curb, gutters and drainage features have been built to acceptable AASHTO specifications and standards as well as to the requirements of section 504 of the Americans with Disabilities Act, and the right-of-way is transferred to the BIA. When requested by the Tribal government, and when resources are available, the BIA Area Office will accept IHA developed streets on the BIA Roads System and will provide ongoing maintenance for those streets that meet the above specifications and standards.

## 6.0 Development of Sanitation Facilities

6.1 HUD Responsibility. To the extent that funds are appropriated by Congress, HUD will provide funding to IHAs to develop water, waste water, solid waste facilities, and O&M infrastructure necessary to support individual low-rent or mutual help housing projects financed by HUD. O&M infrastructure includes the plant, equipment, tools and training needed by utility authorities to provide continuing sanitation service to the residents of HUD-financed homes, as well as the long range planning necessary to identify and implement those requirements.

6.2 IHS Authority. Under section 302(b)(3) of the Indian Health Care Improvement Act, the IHS has the authority to receive HUD funds to provide sanitation facilities for Indian homes financed by HUD.

6.3 IHS Participation in HUD Funded Sanitation Facilities Construction. When requested by the Tribe and the IHA, IHS will endeavor to participate in the construction of sanitation facilities funded by HUD under the mutual help/low rent HUD-assisted housing development program. IHS participation will be on a project by

[[Page 47791]]

project basis, pursuant to an approved MOA duly executed by the IHA, Tribe, IHS, and if necessary, HUD.

6.4 Individual and Community Sanitation Systems. Where it is determined that sanitation facilities are feasible and necessary, the following conditions will apply:

6.4.1 HUD will finance the installation of all dwelling plumbing facilities.

6.4.2 Where facilities serve only HUD-assisted housing project homes, HUD will fund the total cost of the sanitation facilities necessary to serve the project. Where HUD-assisted housing project homes are interspersed with existing homes also served by a sanitation facility, HUD shall fund a prorated share of sanitation facilities costs. All community sanitation system construction, improvement, or expansion will be designed on the basis of a total community concept, such that the proposed sanitation facilities are (a) safe and adequate to meet the environmental health needs of residents, (b) compatible with Tribal infrastructure development, (c) economically feasible to construct and operate, and (d) in compliance with applicable codes, ordinances, and industry standards.

## 7.0 Environmental Compliance

Each signatory agency (HUD, BIA, and IHS) shall be responsible for

following its own applicable procedures addressing the requirements of the National Environmental Policy Act (NEPA), and related and/or similar environmental legislation and/or Executive Orders. A Memorandum of Understanding (MOU), dated June 21, 1991, signed by BIA, HUD, IHS, and the Environmental Protection Agency, clarifies each agency's role in environmental protection.

In the implementation of the roles and responsibilities identified in the MOU and herein, signatory agencies will, to the extent feasible, adopt and/or combine environmental documents which are provided by the other signatory agencies. Joint use of environmental documents that comply with NEPA and related regulations will reduce duplication and paperwork. Copies of one signatory agency's environmental determination documentation (e.g., archeological review) may be required by another signatory agency prior to granting approvals; however, the approving agency shall not require the applying agency to change procedures, format, etc., during the review process and prior to granting its approval.

Unless otherwise provided for in a duly executed MOA, HUD, or a Tribal government which has assumed HUD's NEPA responsibility, shall be the lead agency for the preparation of environmental review, assessments and impact statements in compliance with NEPA for all HUD-assisted housing and related infrastructure projects. When BIA and IHS participate directly in these projects, they shall be cooperating agencies for the purposes of NEPA compliance.

Dated: April 30, 1996.

Donna E. Shalala,  
Secretary, Department of Health and Human Services.

Dated: August 19, 1996.

Bruce Babbitt,  
Secretary, Department of the Interior.

Dated: May 6, 1996.

Henry G. Cisneros,  
Secretary, Department of Housing and Urban Development.  
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| [HOME](#) | [OPINIONS](#) | [CCOJ](#) | [PREVIOUS](#) | [NEXT](#) | \_

## TITLE XIII - EMPLOYMENT RIGHTS

### TABLE OF CONTENTS

	PAGE
Chapter 1. Definitions	XIII-1
Sec. 101. Definitions	XIII-1
(a) "Near the Reservation"	XIII-1
(b) "TERO"	XIII-1
(c) "Director"	XIII-1
(d) "Review Board"	XIII-1
(e) "Convered entity"	XIII-1
(f) "Contract and subcontract"	XIII-1
Chapter 2. Tribal Employment Rights Office	XIII-1
Sec. 201. Establishment	XIII-1
Sec. 202. Director	XIII-1
Sec. 203. Functions	XIII-2
Sec. 204. Implementation of program	XIII-2
Sec. 205. Processing discrimination complaints	XIII-3
Sec. 206. Annual Reports	XIII-3
Sec. 207. Duties of other employment programs	XIII-4
Chapter 3. Tribal Employment Right Review Board	XIII-4
Sec. 301. Establishment	XIII-4
Sec. 302. Qualifications	XIII-4
Sec. 303. Compensation	XIII-5
Sec 304. Jurisdiction	XIII-5
Sec. 305. Sanctions	XIII-5
Sec. 306. Hearing procedures	XIII-6
Sec. 307. Decisions after hearing	XIII-6
Sec. 308. Appeals	XIII-7
Chapter 4. Employment Preference	XIII-7
Sec. 401. Indian employment preference	XIII-7
Sec. 402. Index of Indian applicants	XIII-7
Sec. 403. Hiring	XIII-7
Sec. 404. Layoffs	XIII-8
Sec. 405. Promotion	XIII-8
Sec. 406. Summer students	XIII-8
Sec. 407. Effect of collective bargaining agreements	XIII-8

Sec. 408.	Individual complaints	XIII-9
Sec. 409.	Compliance and hearing procedures	XIII-9
Sec. 410.	Retaliation forbidden	XIII-10
Chapter 5.	Contracting and Subcontracting Preference	XIII-10
Sec. 501.	Indian subcontracting preference for development of trust oil and gas and for construction contracting	XIII-10
Sec. 501 .1.	Scope of preference	XIII-10
	Responsibility for evaluation of technical qualification and reasonable price	XIII-11
Sec. 502.	(a) Technical qualifications	XIII-11
	(b) Reasonable price	XIII-11
Sec. 503.	Submission of a contracting and subcontracting plan	XIII-12
Sec. 504.	Operation of the contract or subcontract	XIII-12
Sec. 505.	Replacement of non-Indian firms by certified firms after a project is underway	XIII-13
Sec. 506.	Reports and monitoring	XIII-14
Sec 507.	Individual complaints	XIII-14
Sec 508.	Compliance and hearing procedures	XIII-14
	Criteria for Indian contract preference certification	XIII-15
	(a) Ownership	XIII-15
	(1) Formal ownership	XIII-15
	(2) Value	XIII-15
	(3) Profits	XIII-15
	(b) Management control	XIII-15
Sec. 509.	(1) Unitary firms (non-joint ventures)	XIII-15
	(2) Joint ventures	XIII-16
	(c) Integrity of structure	XIII-16
	(1) History of the firm	XIII-16
	(2) Employees	XIII-16
	(3) Relative experience and resources	XIII-17
	(d) Residence	XIII-17
Sec. 510.	Applications for certification	XIII-17
Sec. 511.	Certification determinations	XIII-18
Sec. 512.	Probationary certification	XIII-19
Sec. 513.	Final certification	XIII-19
Sec. 514.	Withdrawal of certification	XIII-19
Sec. 515.	Firms certified prior to the adoption of these criteria	XIII-19
Sec. 516.	Annual and other reports	XIII-20
Sec. 517.	List of certified entities	XIII-20
Sec. 518.	Retaliation forbidden	XIII-20
Chapter 6.	Voluntary Indian Preference	XIII-20
Sec. 601.	Voluntary Indian preference policy	XIII-21
Sec. 602.	Employment	XIII-21
Sec. 603.	Oil and gas subcontracting	XIII-21

Sec. 604.	Reporting	XIII-22
Sec. 605.	Preference for contracts with the Tribes and tribal corporations	XIII-22
Sec. 606.	Publicity	XIII-22
Sec. 607.	Review of TERO's actions	XIII-23
Chapter 7.	Liaison Officers	XIII-23
Sec. 701.	Requirement for liaison officers	XIII-23
Sec. 702.	Duration	XIII-24
Sec. 703.	Duties	XIII-24
Sec. 704.	Compensation	XIII-24

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## TITLE XIII-EMPLOYMENT

### Chapter 1. Definitions

#### Sec. 101. Definitions.

For the purposes of this Chapter:

(a) "Near the Reservation" means within reasonable daily commuting distance of any Indian community on the Reservation;

(b) "TERO" shall mean the Tribal Employment Rights Office established by Section 201;

(c) "Director" shall mean the director of TERO appointed under Section 202

(d) "Review Board" shall mean the Tribal Employment Rights Review Board created by Section 301;

(e) "Covered entity" shall mean any individual, corporation, association, partnership, or other entity doing business on trust land on the Reservation,

(f) "Contract and subcontract" shall mean all contracts, including but not limited to, contracts for supplies, services, and equipment, regardless of tier.

### Chapter 2. Tribal Employment Rights Office

#### Sec. 201. Establishment.

There is hereby created the Fort Peck Tribal Employment Rights Office (TERO) as an independent office of the Tribes, reporting directly to the Tribal Executive Board in such manner as the Tribal Executive Board directs.

#### Sec. 202. Director.

The director of TERO shall be appointed by the Tribal Chairman subject to the approval of the Tribal Executive Board, and shall serve at the pleasure of the Tribal Executive Board. The director shall have the authority, subject to the approval of the Tribal Executive Board, to hire staff, expend funds appropriated by the Tribal Executive Board, and to obtain and expend funds from federal, state or other sources to carry out the purposes of TERO.

#### Sec. 203. Functions.

TERO shall:

(a) Implement and enforce all provisions of this Title;

(b) Provide training, counseling and support to Indian workers on the Reservation in conjunction with tribal employment and training programs and other appropriate tribal and federal offices;

(c) Cooperate with federal agencies to enforce federal anti-discrimination statutes, eliminate discrimination against Indians, and to enforce all Indian preference requirements in federal law or contracts with the federal government.

Sec. 204. Implementation of programs.

(a) In implementing this Title, TERO shall develop and phase in programs at a gradual pace in order to ensure a stable and effective program and avoid unnecessary disruption of the business environment on the Reservation;

(b) TERO may implement programs or components of programs on a Reservation- wide basis or it may implement programs covering particular types of covered entities

(c) No significant new program or component of a program shall be introduced, or extended to new types of covered entities, without prior approval of the Tribal Executive Board.

Sec. 205. Processing discrimination complaints.

TERO shall assist the Equal Employment Opportunity Commission (EEOC) and other federal agencies in ensuring protection of the rights of Indians under Title VII of the Equal Employment Opportunity Act of 1972 or other federal laws, by:

(a) Disseminating information informing Indians and others that Indians are protected by federal law against employment discrimination, and of the procedures for making employment discrimination complaints. Such dissemination may include meetings, conferences, distribution of written materials, and other publicity;

(b) Meeting with appropriate offices of the EEOC and other federal agencies as necessary to arrange mutually satisfactory methods of promoting and enforcing the employment rights and preferences of Indians;

(c) Assisting Indians and employers in obtaining informal resolution of discrimination complaints by meeting with both parties and mediating a mutually agreeable solution;

(d) Where informal resolution fails, and the Indian involved desires to press a formal discrimination complaint, assisting the Indian in filing and processing charges of unlawful discrimination with the EEOC, the Office of Federal Contract Compliance, or other appropriate federal agencies, in accordance with the regulations and procedures of those agencies.

Sec. 206. Annual reports.

The TERO Director shall present to the Tribal Executive Board such reports as the Tribal Executive Board may require, including at least annual reports on TERO's activities. The annual reports shall include:

(a) A description of the activities and programs TERO has conducted in the preceding year;

(b) A description of the activities and programs TERO plans to carry out in the upcoming year;

(c) A plan for financing TERO for the upcoming year. The director should consider new funds or reallocation of existing funds from such sources as CETA, ONAP, EEOC, BIA employment assistance, HUD and EDA;

(d) Such other information as the Tribal Executive Board may require.

Sec. 207. Duties of other employment programs.

Tribal employment and training programs and BIA employment assistance programs on the Reservation shall, to the extent consistent with the laws and regulations governing them:

(a) Devote such part of their resources as is necessary to prepare Indians for job opportunities opened up by programs under this Title;

(b) Coordinate with TERO in the development of their training programs;

(c) Co-operate with TERO in carrying out Section 203(b) of this Chapter.

Sec. 301. Establishment.

- (a) There is hereby created the Fort Peck Tribal Employment Rights Review Board;
- (b) The Review Board shall consist of three (3) members and two (2) alternates appointed by the Tribal Executive Board, who serve at the pleasure of the Tribal Executive Board;
- (c) A quorum shall consist of two (2) or more members or one member and one alternate. When, at the time scheduled for a meeting to begin, a member is present but not a quorum, the member may call in either alternate in order to make a quorum.

Sec. 302. Qualifications.

To be eligible to serve on the Review Board, a person must have a high school diploma, be at least twenty five (25) years of age, not have been convicted of a felony, not have been dishonorably discharged from the Armed Forces, not be affiliated with or employed by a business certified or seeking certification under Chapter 5, be physically capable of carrying out the duties of the office, and in the opinion of the Tribal Executive Board, be of sound judgment, good character and possess a reputation for honesty, fairness and impartiality.

Sec. 303. Compensation.

The compensation of members of the Review Board shall be fixed from time to time by the Tribal Executive Board.

Sec. 304. Jurisdiction.

The Review Board shall:

- (a) Conduct hearings and impose sanctions for violations of the Indian employment preference in accordance with Section 409 of this Title;
- (b) Conduct hearings and impose sanctions for violation of the Indian contracting and subcontracting preference in accordance with Section 508 of this Title;
- (c) Make certification decisions with respect to Indian firms in accordance with Sections 511 through 515 of this Title
- (d) Review actions of TERO at the instance of aggrieved parties, in accordance with Section 607 of this Title.

(AMENDED AS PER RESOLUTION NO. 2315-87- 02, DATED 02/25/87.)

Sec. 305. Sanctions.

The Review Board, after a hearing may impose upon any covered entity which fails to comply with any applicable provision of this Title any of the following sanctions:

- (a) Denial or suspension of the right to do business on trust land within the Reservation, provided that the employer shall be given a reasonable time to remove equipment or other property it may have on the Reservation and to arrange with another party For assumption of any contractual obligations it has on the Reservation

"Reasonable time", shall mean a maximum of thirty (30) days unless an extension of time for removal is requested from and granted by the TERO Review Board, upon a showing of legitimate reason(s).

(AMENDED AS PER RESOLUTION NO. 2464-89-5, DATED 05/23/89.)

- (b) Denial or suspension of the right to commence new business on trust land within the Reservation;
- (c) Payment of back pay or other monetary relief to correct harm done to Indians or other entities by the non- compliance;
- (d) Civil fines, not to exceed five hundred dollars (\$500.00) per violation. Each day a covered entity is found to be out of compliance may be considered as a separate violation.

Sec. 306. Hearing procedures.



At all hearings before the Review Board, all participants shall have the following rights:

- (a) To be represented by counsel at their own expense;
- (b) To be present at the hearing;
- (c) To present relevant sworn testimony and documentary evidence, to call witnesses, and to ask questions of witnesses of other participants.

All hearings before the Review Board shall be conducted in an orderly manner, but formal rules of evidence need not be observed.

Sec. 307. Decisions after hearing.

After the hearing, the Review Board shall issue its written decision. All decisions shall state the grounds therefor. A copy of the decision shall be sent to all participants by registered mail.

Sec. 308. Appeals.

A party shall have the right to appeal any decision of the Review Board to the Tribal Court. An appeal shall be filed within thirty (30) days after receipt of notice of the Review Board's decision. The TERO director shall represent the interests of the Tribes on the appeal. The Court shall reverse the decision of the Review Board only where it finds that decision to be arbitrary and capricious, or Unsupported by substantial evidence.

#### Chapter 4. Employment Preference

Sec. 401. Indian employment preference.

Every covered entity is required to give preference to Indians resident on or near the Reservation in hiring, promotion and training of employees on trust land within the Reservation. The provisions of this Chapter apply to all such hiring, promotion and training.

Sec. 402. Index of Indian applicants.

TERO shall maintain an index of Indians seeking employment, and their qualifications. The index shall be maintained and cross-referenced so that TERO can easily and efficiently determine whether any Indians in the index meet the qualifications for a particular job and can develop a list of those who do.

Sec. 403. Hiring.

(a) A covered entity may recruit and hire employees or trainees from whatever source and by whatever process it chooses, provided that it may not hire a non-Indian until TERO certifies that no Indians meeting the qualifications set by the covered entity are listed on its index.

(b) If a covered entity brings work crews or teams or preexisting employees onto the Reservation to perform specific projects on trust land, such crews or teams must include not less than eighty percent (80%) Indians, unless TERO certifies that no Indians meeting the qualification for such crews or teams are listed on its index.

(c) Upon request, TERO will provide a covered entity with a list of those Indians in its index who meet the qualifications specified by the covered entity, or will refer a specified number of such Indians to the entity.

(d) The qualifications set by the covered entity under subsection (a) may not include non-job-related qualifications which have a discriminatory impact on Indian applicants.

(AMENDED AS PER RESOLUTION NO. 788-88-5, DATED 05/11/88.)

Sec. 404. Layoffs.

In all layoffs and reductions in force, no Indian shall be terminated if a non-Indian worker in the same craft or job remains employed. If a covered entity lays off by crews, qualified Indians shall be transferred to crews that will be retained so long as there are non-Indians in the same craft or job employed.

#### Sec. 405. Promotion.

Every covered entity shall give preference to Indians in consideration for promotion and shall encourage Indians to seek promotion opportunities. For all supervisory positions filled by non-Indians, the employer shall file a report with TERO stating what Indians applied for the job, the reasons why they were not given the job, and the efforts made to inform Indians of the opportunity.

#### Sec. 406. Summer students.

Indians shall be given preference in the hiring of summer student help. The employer shall make every effort to promote after-school, summer, and vacation employment for Indian youth.

#### Sec. 407. Effect of collective bargaining agreements.

In no event shall a collective bargaining agreement with any union constitute an excuse for failure to comply with the Indian preference policy of this Chapter. Covered entities with collective bargaining agreements shall obtain any necessary agreement from any union with which it has a collective bargaining agreement or give other satisfactory

- (a) Comply with this Chapter;
- (b) Give absolute preference to Indians in referral, regardless of which union referral list they are on;
- (c) Establish mechanisms, such as phone or mail registration, or a union sub-office near the Reservation, so that Indians do not have to travel great distances to retain their place on union lists;
- (d) Establish necessary journeyman upgrade and advance apprenticeship programs for Indian workers
- (e) "Blanket in" to the union all Indians who qualify and who wish to join the union; and
- (f) Grant work permits to Indians who do not wish to join the union.

TERO's participation in a written agreement with a union shall not constitute official tribal recognition of any union or tribal endorsement of any recruiting activities conducted by any union.

#### Sec. 408. Individual complaints.

Any person or entity which believes that any covered entity has failed to comply with the requirements of this Chapter may file a complaint with TERO whether or not the complaining party can demonstrate it is personally harmed by the alleged non-compliance.

#### Sec. 409. Compliance and hearing procedures.

If TERO has reason to believe, either as a result of a complaint filed pursuant to Section 408 or through its own investigations, that a covered entity has failed to comply with any of the requirements of this Chapter, TERO shall so notify the entity in writing specifying the alleged violation(s). If the party being so notified is a contractor or subcontractor, notice shall also be provided to the entity holding the permit or authorization under which the contractor or subcontractor is operating, and such entity may be a party to all further negotiations, hearings and appeals. The entity cited and TEPO shall have twenty (20) days to pursue a voluntary, informal resolution of the problem. If no such resolution can be reached at the end of twenty (20) days, TERO shall notify the Review Board and request that it set up a formal hearing on the problem within twenty (20) days of Such notice. The procedures at such hearings shall be as provided in Chapter 3. TERO shall pursue on behalf of the Tribes complaints it determines to have merit. If the Review Board decides that an entity has failed to comply with the ordinance, it may impose one or more of the sanctions provided for in Section 305.

#### Sec. 410. Retaliation forbidden.

Any covered entity and any union or person subject to tribal jurisdiction which retaliates against any employee, employer, union, or other entity because of its exercise of rights under this Chapter, or compliance with provisions of this Chapter, shall be subject to the sanctions set forth in Section 305. In additions, if the Review Board determines a complaint has merit, TERO may petition the Tribal Court to order reinstatement or other temporary or permanent injunctive relief to prevent harm or further harm caused by such retaliatory actions.

(THIS CHAPTER AMENDED AS PER RESOLUTION NO. 231 5-87-2, DATED 02/25/87.)

Sec. 501. Indian subcontracting preference for development of trust oil and gas and for construction contracting.

Every covered entity engaged in any aspect of development of oil and gas from trust land within the Reservation, or engaged in contracts for the improvement of real estate of any kind whatsoever on trust land within the Reservation, shall give preference to firms certified by the Tribes under this Chapter in all contracts and subcontracts to be performed on the Reservation.

Sec. 501.1. Scope of preference.

An entity engaged in activity subject to this Chapter may not enter into a contract or subcontract with a firm not certified under this Chapter unless it has contacted every certified firm in the relevant field and has determined that there is no certified firm that is technically qualified to perform the work required and willing to do so at a reasonable price. So long as a certified firm meets minimum threshold qualifications, no other firm may be selected for any contract or subcontract. If the entity determines that a certified firm lacks the qualifications to perform all of the work required under a contract or subcontract the entity shall make a good faith effort to divide the work required into smaller portions so that the certified firm can qualify for a portion of the work. An entity engaged in activity subject to this Chapter shall be responsible for the compliance of all its contractors and subcontractors with this Chapter. No entity shall circumvent the requirements of this Section by hiring non-Indians and designating them as employees rather than contractors or subcontractors.

Sec. 502. Responsibility for evaluation of technical qualification and reasonable price.

(a) Technical qualifications. A covered entity engaged in activity subject to this Chapter shall determine the technical qualifications required for a particular contract or subcontract. However, if the entity determines that all certified firms are not qualified, the entity must first (1) interview the principals in all available certified firms to determine their knowledge and expertise in the area and (2) provide to each certified firm it rejects a description, in writing, of areas where it believes the firm is weak and steps it could take to upgrade its qualifications. The entity shall evaluate a certified firm that does not yet have an established record on the basis of the individual qualifications of the principals in the firm, their equipment, and any other relevant factors which provide guidance on the firm's ability to perform the work.

(b) Reasonable price. A covered entity engaged in activity subject to this Chapter may use any process it chooses for determining a reasonable price including, but not limited to, competitive bidding (open or closed) or private negotiations. However, before an entity can reject a certified firm on the basis that it is not willing to do the work at a reasonable price, it must offer the certified firm an opportunity to negotiate price. If there is only one technically qualified certified firm, an entity must enter into negotiations on price with such firm and contract with that firm if a reasonable price can be negotiated. No covered entity may reject a certified firm on the grounds that the price is not reasonable, and subsequently contract with a non-certified firm at the same or a higher price.

Sec. 503. Submission of a contracting and subcontracting plan.

(a) Before, or at the same time as, a covered entity submits a request for a permit, lease or other authorization to engage in activity subject to this Chapter to the Executive Board, it must submit a contracting and subcontracting plan to TERO for approval. The plan shall indicate contracts and subcontracts that will be entered into in such activity and projected dollar amounts thereof. If the entity has already selected a firm to perform any contract or subcontract work, it shall list the name of that firm and indicate whether or not it is a certified firm. If the firm selected is not a certified firm, the covered entity shall further indicate why each certified firm registered with TERO in the relevant area of endeavor was not selected, and the name of a contact person at each certified firm with which the covered entity dealt. No authorization shall be granted to any firm which submits a plan indicating that less than one hundred percent (100%) of the value of all subcontracts will be paid to certified firms unless the entity can demonstrate that it was unable to employ Indian firms for subcontract categories because there was an insufficient number of Indian firms qualified or available. To make such a demonstration the entity must show, at a minimum, that is interviewed all Indian firms listed on the TERO register in that area of endeavor and that: (1) a sufficient number was not available to enable it to meet the goal; or (2) the ones that were available and would have enabled the entity to reach the goal were rejected because they lacked the necessary technical qualifications; or (3) that no certified firm was willing to do the work at a reasonable price after negotiation as required by Section 502;

(b) No entity authorized to engage in activity subject to this Chapter shall deviate from its plan in a manner that diminishes the percentage of Indian subcontracting, without prior written notification to TERO, and obtaining prior written approval of TERO;

(AMENDED AS PER RESOLUTION NO. 2465-89-5, DATED 05/23/89.)

(c) TERO shall have the right to inspect the records of any entity to ensure that a plan is complied with.

Sec. 504. Operation of the contract or subcontract.

Once an entity enters into a contract with a certified firm, the Tribes will not intervene in any way in the relationship between the parties unless a certified firm demonstrates that action taken against it is intended primarily to circumvent the requirements of this Title.

Sec. 505. Replacement of non-Indian firms by certified firms after a project is underway.

(a) When an entity hires a non-certified firm because no certified firm exists at the time the non-certified firm was hired and a certified firm subsequently comes into existence, TERO shall promptly notify the entity of the existence of the certified firm;

(b) The entity shall replace the non-certified firm with a certified firm if:

(1) The contract or relationship between the entity and the non-Indian firm is expected to extend more than one year beyond the date of notification by TEPO;

(2) The certified firm is technically qualified to do the work, and

(3) The certified firm is prepared to undertake the work on the same terms, including price, as the non-certified firm performing the contract.

(c) If the relationship between the entity and the non-certified firm is through a year-to-year contract, the non-certified firm shall be replaced only when the contract expires; provided that, if the contract expires within one hundred twenty (120) days following notification that a certified firm is available, the entity shall have the right to extend the contract with the non-certified firm to a date not to exceed thirty (30) days from that notice,

(d) If there is no written contract or if the contract is not a year-to-year contract, the entity will have thirty (30) days after notification by TERO to replace the non-Indian firm with the certified firm;

(AMENDED AS PER RESOLUTION NO. 2466-89- 5, DATED 05/23/89.)

(e) The requirements of this Section may be waived or the transition period extended by TERO in individual cases upon a showing of hardship upon the covered entity.

Sec. 506. Reports and monitoring.

(a) All entities engaged in any activity subject to this Chapter shall submit such reports to TERO as it requests. An entity may refuse to submit any information which it can demonstrate must remain confidential for valid business purposes;

(b) Employees of TERO shall have the right to make on-site inspections during regular business hours in order to monitor compliance with this Chapter and shall have the right to talk to any employee on-site so long as it does not interfere with the operations of the business.

Sec. 507. Individual complaints.

Any certified firm, group of certified firms, or other person or entity which believes that any entity engaged in activity subject to this Chapter has failed to comply with the requirements of this Chapter may file a complaint with TERO whether or not the complaining party can demonstrate it is personally harmed by the alleged non-compliance.

Sec. 508. Compliance and hearing procedures.

If TERO has reason to believe, either as a result of a complaint filed pursuant to Section 507 or through its own investigations, that an entity engaged in activity subject to this Chapter on trust land has failed to comply with any of the requirements of this Chapter, TERO shall so notify the entity in writing specifying the alleged violation(s). If the party being so notified is a contractor or subcontractor, notice shall also be provided to the entity holding the permit or authorization under which the contractor or subcontractor is operating, and such entity may be a party to all further negotiations, hearings and appeals. The entity cited and TERO shall have twenty (20) days to pursue a voluntary, informal resolution of the problem. If no such resolution can be reached at the end of twenty (20) days, TERO shall notify the Review Board and request that it set up a formal hearing on the problem within twenty (20) days of such notice. The procedures at such hearings shall be as provided in Chapter 3. TERO shall pursue on behalf of the Tribes complaints it determines to have

merit. If the Review Board decides that an entity has failed to comply with this Chapter, it may impose one or more of the sanctions provided for in Section 305, and may order the party to take such corrective actions as are necessary to remedy any harm done to the Tribes or to certified firms by the non-compliance.

Sec. 509. Criteria for Indian contract preference certification.

To receive certification as a firm eligible for Indian preference an applicant must satisfy all of the following criteria:

(a) Ownership. The entity must be fifty one percent (51%) or more Indian owned. The applicant must demonstrate the following:

(1) Formal ownership. That an Indian or Indians own(s) fifty one percent (51%) or more of the partnership, corporation, joint venture, or other arrangement for which the application is being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement. Ownership includes: (i) financial ownership and (ii) control. The Indian(s)' ownership must provide him or her with a majority of voting rights or other decisional mechanisms regarding all decisions of the firm and the Indian(s) must receive at least a majority of the firm's assets upon dissolution;

(2) Value. The Indian owner(s) must provide real value for his/her majority ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his/her ownership share. It will not be considered "real value" if the Indian(s) purchased his/her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation thereof, or any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills marketing connections, or similar benefits to the firm that there is good reason to believe the arrangement would have been entered into even if there were not an Indian preference program in existence;

(3) Profits. The Indian owner(s) must receive at least fifty one percent (51%) of all profits. If there is any provision that gives non-Indian owner(s) a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, bonus tied to profits, or other vehicles, certification will be denied. Salary scales will be reviewed to ensure that the relative salaries being paid Indian and non-Indian owners are consistent with the skills of the parties and are not being used to circumvent the requirement that Indian owners receive at least fifty one percent (51%) of the profits.

(b) Management control. The firm must be under significant Indian management control. The firm must be able to demonstrate that:

(1) Unitary firms (non-joint ventures). One or more of the Indian owners is substantially involved as a senior level official in the day-to-day management of the firm. The Indian owner does not have to be the 'Chief Executive Officer'. However he or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she: (1) is qualified to serve in the senior level position; and (2) is sufficiently knowledgeable about the firm's activities to be accountable to the Tribes on the firm's activities. This provision shall be waived when: (1) the firm is one hundred percent (100%) Indian-owned and the Chief Executive Officer is the spouse and/or parent of the owner(s), the family lives on or near the Reservation, and the majority of employees are Indian; or (2) the firm is owned by ten (10) or more persons, is at least seventy percent (70%) Indian-owned, the Chief Executive Officer and the highest-salaried employee in the firm are Indian, and a majority of the employees are Indian;

(AMENDED AS PER RESOLUTION NO. 2467-89-5, DATED 05/23/89.)

(2) Joint ventures. A joint venture will be required to demonstrate that the Indian firm, in addition to meeting the requirements on management control set out in subsection (b)(1) above, is, in fact, the controlling partner in the joint venture. The venture will be required to demonstrate that the Indian partner has the experience and expertise to manage the entire operation and that the non-Indian partner is providing specialized or limited resources or expertise to the venture and is not the manager in fact.

(c) Integrity of structure. The firm must not have been established solely or primarily to take advantage of the Indian preference program. In evaluating an applicant under this criterion TERO will consider the factors set out below. TERO shall exercise broad discretion in applying these criteria in order to preserve the integrity of the Indian preference program and in questionable cases shall deny certification:

(1) History of the firm. Whether the history of the firm provides reason to believe it was established primarily to take advantage of the Indian preference program, particularly whether the firm, a portion of the firm, or key actors in the firm originally associated with a non-Indian-owned business that gained little of business value in terms of capital, expertise, equipment, etc. by adding Indian ownership or by merging with an Indian firm.

(2) Employees. (i) whether kry non- Indian employees of the applicant are former employees of a non-Indian firm with which the Indian firm is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the non Indian firm is controlling the applicant; (ii) Whether Indians are employed in all or most of the positions for which qualified Indians are available. A high percentage of non-- Indian employees in such positions will provide reason to believe the firm was established primarily to benefit non-Indians.

(3) Relative experience and resources. Whether the experience, expertise, resources, etc., of the non— Indian partner(s) is so much greater than that of the Indian(s) that there is little sound business reason for the non-Indian to accept a junior role in the firm or venture other than to be able to take advantage of the Indian preference program.

(d) Residence . The entity must have its principal place of business on or near the Fort Peck Reservation.

#### Sec. 510. Applications for certification.

An individual or entity seeking certification as eligible for Indian preference shall submit a completed application, accompanied by an application processing fee of twenty five dollars (\$25.00), to TERO on forms provided by TERO office. TERO staff will be available to assist an applicant in filling out and filing the application.

The application shall contain, at a minimum, the following information:

(a) The applicant's name, residence, business name and address, the period of time the applicant has resided or done business on the Reservation, and if the applicant is an individual, satisfactory proof that the applicant is an Indian.

If the applicant is other than an individual, the name, address and period of residence at that address of each partner, officer and other person owning a financial interest in the net earnings of the applicant's on-Reservation business, The percentage ownership interest of each partner, officer, and other person in the applicant's net earnings from on-Reservation activities whether such partner, officer and other person is Indian or non-Indian, and if Indian, satisfactory proof that the individual is an Indian;

(b) Information sufficient to demonstrate that the criteria of Section 509(a) and (b) are met;

(c) Information concerning the origins and history of the applicant, and its employees sufficient to allow evaluation of the firm under Section 509(c);

(d) Satisfactory proof that the applicant is qualified to conduct and operate the business for which certification is sought;

(e) A statement of the applicant's policy with respect to the employment of Indians resident on the Reservation and a history, if any, of past employment of Indians resident on the Reservation;

(f) A statement reading as follows:

The undersigned each hereby certify on behalf of the applicant and each for himself or herself that the foregoing statements are true and correct and that if any material is false, any license granted pursuant to this application shall be void and of no force or effect.

#### Sec. 511. Certification determinations.

Within twenty one (21) days after receipt of a completed application, TERO shall review the application, request such additional information as it believes appropriate (the twenty one (21) day period shall be stayed during the time any request for additional information is outstanding), conduct such investigations as it deems appropriate, and submit an analysis and recommended disposition to the Review Board. Copies of the analysis and recommended disposition shall be kept confidential and shall not be made available to the applicant or any other party. When it is so required, TERO may extend the processing period by an additional twenty one (21) days, by sending notification of the extension to the applicant by registered mail. Within fifteen (15) days of receipt of TERO's analysis and recommended disposition, the Review Board shall hold a hearing on the application, posting notice of the hearing time at the Tribal Office, and Agency and The TERO office at least five (5) days prior to the hearing. In addition, any other party wishing to present information to the Review Board shall be entitled to do so, by requesting, no less than one (1) day prior to the hearing, an opportunity to participate and may be represented by counsel. Hearings and any appeals shall be conducted as provided in Chapter 3 of this Title.

#### Sec. 512. Probationary certification.

An applicant granted certification shall be issued a six (6) month probationary certificate, upon payment to TERO of a fifty

dollars (\$50.00) certification fee. During that period, TERO shall monitor the firm's activities to ensure that the firm is operating in the manner described in its application. During the probationary period, TERO shall have the right to request and receive such information and documents as they deem appropriate.

Sec. 513. Final certification.

At the end of the probationary period the Review Board, after receiving recommendations from TERO, shall either grant full certification or deny certification.

Sec. 514. Withdrawal of certification.

From information provided in the change notices or Annual Reports required by Section 516, on the basis of a written grievance filed by any other firm or person, or on its own initiative, TERO may initiate proceedings to withdraw or suspend certification for any firm. TERO shall prepare an analysis and recommended disposition for the Review Board and shall send the firm notice, by registered mail, that its certification is being examined, along with the grounds thereof. The Review Board shall then set a date for a hearing, which shall be held within twenty one (21) days after it receives the analysis and recommended disposition from TERO. At the hearing, TERO staff shall present the case for suspension or withdrawal and the hearing shall be conducted as in Chapter 3 of this Title. After the hearing, the Board may: (1) withdraw certification; (2) suspend certification for up to one (1) year; (3) put the firm on probation; and/or (4) order that corrective action be taken within a fixed period. A firm that has had its certification withdrawn may not reapply for a period of one (1) year.

Sec. 515. Firms certified prior to the adoption of these criteria.

Each firm holding Indian preference certification from the Tribes prior to the effective date of this Chapter shall remain certified without submitting a new application under Section 510. However, if any such firm does not meet the criteria of Section 509, certification may be withdrawn in accordance with Section 514.

Sec. 516. Annual and other reports.

Each certified firm shall report to TERO, in writing, any changes in its ownership or control status within sixty (60) days after such changes have occurred. Each certified firm, on the anniversary of its receipt of permanent certification, shall update the information provided in its initial application on an Annual Report form provided by TERO. Failure to provide information pursuant to these requirements shall constitute grounds for withdrawal of certification.

Sec. 517. List of certified entities.

TERO shall maintain a current list of all entities certified pursuant to this Chapter. Copies of this list shall be posted in a conspicuous place in the TERO office, shall be made available to the interested public, for a reasonable copying fee, and shall be brought to the attention of those persons, associations, partnerships and corporations seeking to employ subcontractors for activity subject to this Chapter. No preference as between certified entities shall be indicated on the list.

Sec. 518. Retaliation forbidden.

Any covered entity and any union or person subject to tribal jurisdiction which retaliates against any employee, employer, union, or other person because of the person's exercise of rights under this Chapter, or compliance with provisions of this Chapter, shall be subject to the sanctions set forth in Section 305. In addition, if the Review Board determines a complaint has merit, TERO may petition the Tribal Court to order reinstatement or other temporary or permanent injunctive relief to prevent harm or further harm caused by such retaliatory actions.

(SECTIONS 519-522 ARE REPEALED AS PER RESOLUTION NO. 2315-87-2, DATED 02/25/87.)

Chapter 6. Voluntary Indian Preference

Sec. 601. Voluntary Indian preference policy.

(a) It is the policy of the Tribes that all employers on or near the Reservation, which are not covered entities subject to Chapter 4 of this Title, should give preference to Indians resident on or near the Reservation in hiring and promotion of all employees;

(b) It is the policy of the Tribes that all entities engaged in activities on or near the Reservation, which would be subject to Chapter 5 of this Title if they were conducted on trust land, should give preference to firms certified under Chapter 5 in contracting and subcontracting.

(AMENDED AS PER RESOLUTION NO. 2315-87-2, DATED 02/25/87.)

Sec. 602. Employment

(a) Prior to opening a new business or beginning a new project requiring the hiring of employees on or near the Reservation, the Tribes request that an employer notify TERO of its intentions. TERO shall ascertain how many employees the employer expects to hire and the relevant qualifications for each job category. Based on the availability of qualified Indians, TERO shall determine how many Indians should be hired, and when, for each employer to honor the voluntary Indian employment preference policy of Section 601(a);

(b) TERO shall monitor all employers on or near the Reservation to determine whether the policy of Section 601(a) is being honored. Following appropriate consultation and investigation TERO shall issue certificates of compliance to employers honoring the employment preference policy, and certificates of non-compliance to employers not honoring the policy. Employers without good cause refusing TERO access to information necessary to make such a determination shall be issued a certificate of non-compliance;

(c) Upon request, TERO shall provide any employer on or near the Reservation with a list of those Indians in its index who meet the qualifications specified by the employer, or will refer a specified number of such Indians to the employer.

Sec. 603. Oil and gas subcontracting.

(a) Prior to beginning a new project on or near the Reservation, the Tribes request that an entity engaged in activity subject to 601(b) notify TERO of its intentions. TERO shall consult with all such entities to assist in carrying out the contracting and subcontracting preference policy of Section 601(b). For each such entity TERO shall ascertain what contracts and subcontracts the entity expects to let. Based on the availability of certified firms, TERO shall determine how many certified firms should be utilized for the entity to honor the voluntary policy;

(b) TERO shall monitor all entities engaged in activity subject to 601(b) to determine whether the policy of Section 601(b) is being honored. Following appropriate consultation and investigation, TERO shall issue certificates of compliance to entities honoring the policy and certification of non-compliance to entities not honoring the policy. Entities without good cause refusing TERO access to information necessary to make such determination shall be issued a certificate of non-compliance;

(c) Upon request, TERO shall provide any entity engaged in activity subject to 601(b) with copies of the list of certified entities maintained pursuant to Section 517.

(AMENDED AS PER RESOLUTION NO. 2315-87- 2, DATED 02/25/87.)

Sec. 604. Reporting.

The first week of each month, TERO shall report the names of employers and entities it has found honoring and not honoring the policy of this Chapter to the Executive Board.

Sec. 605. Preference for contracts with the Tribes and tribal corporations.

The Tribes, and all tribally owned corporations, shall give a preference to employers and entities which comply with the policy set forth in this Chapter in the awarding of contracts and in all other business transactions.

Sec. 606. Publicity.

(a) With the approval of the Executive Board, TERO may publicize in newspapers or otherwise, the names of employers or entities in compliance with, and the names of employers or entities not in compliance with, the Tribes' Indian preference policy;

(b) A least ten (10) days prior to the publication of the name of any employer or entity that employer or entity shall be notified that it will be named, and in which category. If an entity believes a mistake has been made, it may so advise TERO and seek a change.

Sec. 607. Review of TERO's actions.

Any person aggrieved by an action of TERO, its Director or employees under this Chapter shall have a right to appeal the action to the Review Board in accordance with Chapter 3. The challenged action shall be upheld unless the person



aggrieved can show that the action was arbitrary, capricious, beyond the authority of TERO as set forth in this Chapter, or in violation of federal or tribal law. The Executive Board and its Chairman, TERO and its Director and employees shall not be liable for monetary damages for actions taken in good faith under this Chapter by TERO, its Director or employees.

#### Chapter 7. Liaison Officers

(THIS CHAPTER AMENDED AS PER RESOLUTION NO. 231 5-87-2, DATED 02/25/87.)

##### Sec. 701. Requirement for liaison officers.

(a) Any covered entity engaged in:

- (1) geophysical exploration on trust land;
- (2) drilling for oil and gas on trust land; or

(3) geophysical exploration or drilling for oil and gas on fee land where a right-of-way has been granted across trust land to facilitate the activity on fee land, shall employ a Liaison Officer.

(b) Any covered entity constructing a road, power line, telephone line, water line, sewer line, or oil or gas transportation line or other public utility:

(1) across trust land; or

(2) across fee land if a right-of-way has been granted across trust land to facilitate the construction, shall employ a Liaison Officer if the total cost of the project is expected to exceed twenty thousand dollars (\$20,000.00).

##### Sec. 702. Duration.

The Liaison Officer shall be employed:

(a) on a geophysical project or project subject to Section 701 (b) from the start of the project, ordinarily beginning with the surveying, through the final inspection of the Tribes;

(b) on drilling for oil and gas from site preparation through completion, or plugging and abandonment, of the well.

##### Sec. 703. Duties.

The duties of the Liaison Officer shall be as follows:

(a) Act as liaison between the covered entity and the Tribes' oil and gas committee, the Tribal Minerals Resources Department, TERO and the Bureau of Indian Affairs;

(b) Detour projects around tribal historical sites, such as buffalo jumps, teepee rings, burial grounds, social areas, etc., to the extent feasible;

(c) Inspect the right-of-way or the permitted or leased area for the condition of the land, livestock, and fencing prior to the project's start, during the project and at the completion and final inspection of the project or termination of the Liaison Officer's duties as stated in Section 702;

(d) Report all violations of land damage, fire, employee discrimination, and TERO regulations and complaints to the proper authorities;

(e) File weekly reports to the Tribal Oil and Gas Committee, or Tribal Mineral Resources Department, as appropriate, TERO, and the Bureau of Indian Affairs on all daily activities.

##### Sec. 704. Compensation.

The Liaison Officer shall be paid by the covered entity according to a rate of compensation established by the Director of TERO with the approval of the Executive Board.



| [TOP](#) | [HOME](#) | [OPINIONS](#) | [CCOJ](#) | [PREVIOUS](#) | [NEXT](#) | \_

**ORDINANCE OF THE HOOPA VALLEY TRIBE  
HOOPA VALLEY INDIAN RESERVATION  
HOOPA, CALIFORNIA**

ORDINANCE NO. 2-80, AS AMENDED

DATE APPROVED: APRIL 27, 1995

SUBJECT: ESTABLISHMENT OF STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND APPLICATION OF INDIAN PREFERENCE

WHEREAS: The Hoopa Valley Tribe adopted a Constitution and Bylaws on June 20, 1972, which the Commissioner of Indian Affairs approved on August 18, 1972, and Article IX, Section 1 (f) thereof authorizes the Hoopa Valley Business Council to "provide assessments or license fees..."; Article IX, Section 1(g) thereof authorizes the Council to "negotiate with the Federal, State, and local governments on behalf of the tribe"; Article IX, Section 1(j) thereof authorizes the Council to "exclude from the restricted land of the Hoopa Valley Indians persons not legally entitled to reside therein"; and Article IX, Section 1(l) thereof authorizes the Council to "safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation"; and

WHEREAS: As part of the solutions for developing a sound and progressive socio-economic environment for the Hoopa Valley Reservation community, the Hoopa Valley Business Council has determined that access to employment opportunities is a major part of a comprehensive approach, and toward that end has enacted a Tribal Employment Rights Ordinance providing for Indian preference in hiring and contracting; and

WHEREAS: There is a need to clarify the policies and procedures of previous TERO enactments to insure consistent enforcement by the Tribe and full compliance by all employers conducting commercial or employment activities within the Reservation; and

WHEREAS: There is also a need to expand and consolidate the authority of the TERO Office so that it may regulate all aspects of employment practices on the Reservation, including those regulated under previous TERO enactments.

THEREFORE BE IT NOW RESOLVED THAT: The Hoopa Valley Business Council does hereby amend Ordinance No. 2-80 in a manner that substitutes this Amendment as Title 13 of the Law and Order Code of the Hoopa Valley Tribe, and further declares that except as expressly provided herein, any and all previous TERO enactments are hereby repealed and shall be of no effect.

**ORDINANCE NO. 2-80, AS AMENDED**

**APRIL 27, 1995**

**SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE**

**BE IT FURTHER RESOLVED THAT:** Ordinance No. 1-85 is hereby amended to confirm Council's intent that said Ordinance require all covered employers to maintain Workman's Compensation Insurance, and to develop a practical definition that effectively distinguishes employees from subcontractors, and the Legal Department is hereby authorized and directed to revise the language of said Ordinance in a manner consistent with this amendment and to present it for Council's ratification not later than the second Regular Council Meeting after the meeting at which this TERO Ordinance is approved.

**BE IT FURTHER RESOLVED THAT:** All matters arising under this Title shall be regulated, administered, and adjudicated exclusively under the procedures set forth herein, and shall not be subject to any different or concurrent procedures set forth in the Personnel Policies of the Tribe, in the Appellate Review Procedure approved by Resolution No. 83-147 of November 22, 1983, or in any other tribal law or policy that might otherwise be applicable in the absence of this clause.

**BE IT FURTHER RESOLVED THAT:** The policies and procedures embodied in this Ordinance are intended to fulfill a fundamental obligation of the Council to provide for the basic welfare of the members of the Hoopa Valley Tribe and other Indians of the Reservation community.

**BE IT FURTHER RESOLVED THAT:** The Tribal Chairman's Office, in consultation with the Legal Department shall take all steps necessary to transmit this Ordinance to the Bureau of Indian Affairs for approval for enforcement with respect to non-members of the Tribe, pursuant to Article IX, Section 1(1) of the Tribal Constitution; provided, however, that this Ordinance shall be deemed approved if not acted upon by the Bureau of Indian Affairs within sixty (60) days of its transmission from the Tribe.

### **TITLE 13**

#### **STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND APPLICATION OF INDIAN PREFERENCE**

##### **13.0 SHORT TITLE**

The short title of this ordinance shall be the Tribal Employment Rights Ordinance, or TERO.

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

### 13.1 EFFECT ON PRIOR ENACTMENTS

13.1.1 Repeal. Amendments 1 through 7 of the TERO Ordinance, Resolution 81-101 and the TERO Guidelines approved thereby, and Council Resolution No. 88-75 are hereby repealed and shall be of no further force and effect; provided, however, that any existing agreements or contracts authorized under these now repealed enactments shall remain in effect until such agreements or contracts expire or are terminated; and provided, further, that the TERO Commission established by this Ordinance may terminate any existing Indian preference agreement and issue a permit in conformance with this Ordinance upon notice to the affected party and opportunity for a hearing.

13.1.2 Enforcement of Ordinance No. 1-85, Certification of Indian Firms. The TERO Commission is authorized to certify that an enterprise meets the definition of an Indian firm set forth in Section 13.2.4 for purposes of Indian preference, and for documentation of minority small business contract eligibility or claimed exemptions from state taxation and wage performance bond requirements; provided, however, that certification as provided herein shall not oblige the Commission to advocate the claims of private individuals and entities before any agency of another government.

13.1.3 Fair Operating Standards and Dispute Resolution Procedures for Reservation Timber Sales Preserved Pending Approval of Administrative Rules. TERO procedures established for Reservation timber sales under the former MOU between Hoopa Forest Industries and the Bureau of Indian Affairs, and consisting of (1) Exhibit A to TERO Amendment No. 7, May 21, 1987, Fair Operating Standards and Procedures, and (2) the Report of Timber Sale Contract/MOU Work Group, April 15, 1987, including in particular the Contractor-Subcontractor Dispute Procedure, are hereby preserved to the extent that they do not conflict with the substantive provisions of this Ordinance; provided that the TERO Commission established by this Ordinance shall review, revise, and subject to Council approval, reissue these procedures as administrative rules not later than 60 days after the effective date of this Ordinance.

### 13.2 DEFINITIONS

13.2.1 "Indian" means any member of any federally recognized

**ORDINANCE NO. 2-80, AS AMENDED**

**APRIL 27, 1995**

**SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE**

tribe, or any person who furnishes documentary proof that he or she is recognized as an Indian by the United States pursuant to its trust responsibility to American Indians.

**13.2.2 "Hoopa Reservation" or "Reservation" means the Hoopa Valley Indian Reservation as defined under Article III of the Constitution and Bylaws of the Hoopa Valley Tribe.**

**13.2.3 "Employer" means any person, company, contractor, subcontractor or entity located or engaging in commercial or employment activity on the Hoopa Reservation, and which employs two or more persons.**

**13.2.4 "Indian Firm" means a firm or business certified by the TERO Commission as eligible for Indian preference in contracting and subcontracting; provided that Indians hold at least 51% ownership interest in such firm or business and exercise majority management control.**

**13.2.5 "Commission" and "Office" mean the Tribal Employment Rights Commission and its Office and the Tribal Office of Employment Relations.**

**13.2.6 "Council" means the Hoopa Valley Business Council.**

**13.2.7 "Minimum Threshold" means a minimum level above which Indian preference will be required as established by:**

1. Job Descriptions;
2. Interview Committees;
3. Skills Tests;
4. RFP's and License Requirements;
5. Other Written Requirements.

**13.3 ESTABLISHMENT OF TERO COMMISSION AND OFFICE**

**13.3.1 Establishment and Purpose of Commission**

The Hoopa Valley Business Council does hereby establish the Tribal Employment Rights Commission (TERO Commission) for the purposes of (A) implementing and enforcing the provisions of this Ordinance, and (B) providing exclusive and independent investigation and administrative review of personnel actions and grievances arising under the Personnel Policies and Procedures of

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

the Hoopa Valley Tribe, Tribal Ordinance No. 1-85, Unemployment, Disability, and Workman's Compensation Insurance Ordinance, as amended herein, or other Council enactments regulating employment practices of the Tribe or its entities (including without limitation the Hoopa Valley Development Enterprise and its subsidiaries and successors) or other employers or contractors within the Reservation.

Consistent with the third "Resolved" clause of this Ordinance, the procedures set forth in this title shall supersede any and all other procedures set forth in the Tribe's Personnel Policies and Procedures or in the Appellate Review Procedure approved in Resolution 83-147 with respect to any matter regulated hereby.

**13.3.2 General Powers of the Commission**

(A) Organizational Authority. The Commission may hire immediate TERO staff, obligate funds appropriated by the Council, and secure and obligate funding from Federal, State or other sources to carry out its duties and functions under this Ordinance. The Commission is further authorized and directed to adopt such organizational bylaws as are necessary to enable it to carry out its duties and functions. The Commission shall report directly to the Council. The TERO Commission shall be subject to the Conflict-of-Interest and Nepotism Ordinance of the Hoopa Valley Tribe.

(B) Regulatory Authority.

(1) The Commission shall issue rules, regulations, interpretations of law, and guidelines for Indian preference necessary to implement this Ordinance. Such rules shall become effective upon written approval of the Council. Approved rules shall be codified in the Revised Code of the Hoopa Valley Tribe, and the Commission shall take other reasonable steps to insure that the general Reservation community is on notice of all Indian preference and employment related laws.

(2) The Commission shall maintain an Indian Skills Bank as a means of providing qualified Indian employees to employers, contractors, and subcontractors. The Commission shall actively recruit Indians for listing in the Skills Bank. The Commission shall also actively recruit and certify Indian firms as eligible for Indian

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND APPLICATION OF INDIAN PREFERENCE

Preference in contracting and sub-contracting.

(3) The Commission is authorized to certify Indian firms, from on or off the Reservation, for purposes of Indian preference, minority small business contract eligibility, exemption from state taxation and wage performance bond requirements, and other purposes. The Commission shall develop administrative rules to implement this authority, which shall include provisions and procedures for revocation of such certifications.

(4) The Commission may register off-reservation contractors and sub-contractors, approve Indian Preference Plans, and issue permits to such contractors according to rules and procedures to be developed, which shall include procedures for revocation of such permits.

(5) The Commission is further authorized and directed to investigate complaints regarding any violation of the provisions of this Ordinance or any other tribal law the Commission is authorized to enforce; the Commission may also investigate possible violations on its own initiative.

(C) Adjudicatory Authority

The Commission may hold hearings on and determine any matter under its authority, including but not limited to hearings necessary to the issuance, modification, and revocation of any permit, license, certification, or assessment authorized hereunder, as well as any adjudicatory hearing regarding violations of the provisions of this Ordinance or of any other general tribal law or specific departmental employee grievance procedure. The Commission shall promulgate simple and fair rules of procedure to govern its adjudications, and is authorized to issue compliance orders and to impose civil penalties in the form of fines.

(D) Cooperative Agreements with Other Governments

The Commission may negotiate, and upon Council approval, enter into cooperative agreements with agencies of state and federal government in order to implement the intent of this Ordinance, eliminate unlawful discrimination against Indians, and to provide for review of other employment related issues.



ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

### 13.3.3 Composition of the Commission

(A) The Commission shall be composed of five (5) members in good standing in the community. Three (3) members of the Commission shall be appointed by the Council in October of even numbered years, each for a term of two (2) years; and two (2) members shall be appointed in odd numbered years, each initially for a term of one (1) year, thereafter being appointed in October of odd-numbered years each for a term of two (2) years. Any member may be removed by the Council at any time for cause, subject to notice and opportunity for a hearing before Council. All terms of office shall commence on October 1 of the year position becomes vacant.

(B) Decisions of the TERO Commission shall be made by a majority vote. A quorum shall consist of any three of the five Commission members.

(C). Any Commission member who is also on the staff of the Council shall be disqualified from any involvement in decisions affecting the tribal department or entity with which he or she is employed.

### 13.3.4 Powers of the TERO Director

The TERO Director shall have those powers delegated by the Commission as it deems necessary to carry out this Ordinance. The Director shall be the investigating agent for the Commission responsible for investigating, researching, reporting and documenting any information required by the Commission. The Director shall report directly to the Commission.

## 13.4 INDIAN EMPLOYMENT PREFERENCE POLICY AND PROCEDURES

All employers shall extend a preference to qualified Indians, as provided herein, in all aspects of employment, including but not limited to recruitment, hiring, promotion, lateral transfers, retentions, training, contracting, and subcontracting. No employer may recruit, hire, or otherwise employ any non-Indian for any employment position covered by this Ordinance, unless and until the TERO Commission has furnished written notice to such employer that no qualified Indians are available for such position.

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

13.4.1 Applicability

Unless clearly and expressly prohibited by federal and other tribal laws, this Ordinance shall apply to all employers, including but not limited to: The Council and all its programs, departments, and chartered entities or enterprises; private employers and independent contractors and subcontractors, including those performing work for the Council, the State of California, or the United States.

13.4.2 Covered Positions

The Indian Employment Preference Policy of this section shall apply to each and every job classification, skill area, or craft recognized or utilized by an employer, including administrative, supervisory, and professional classifications.

13.4.3 Qualified Indians; Employment Criteria

An Indian shall be qualified for employment in a position if he or she meets the minimum threshold requirements for such position, and such Indian shall be accorded the preferences to which he or she is entitled under this Ordinance. No employer may utilize any employment criterion that is not legitimately related to the performance of the position.

13.4.4 Eligible Indians

(A) Hoopa Valley Tribe and its Entities. The Hoopa Valley Tribe and its programs, departments, and chartered entities and enterprises shall extend Indian preference according to the following priorities:

- (1) Members of the Hoopa Valley Tribe;
- (2) Indian spouses of members of the Hoopa Valley Tribe;
- (3) Other resident local Indians.
- (4) Other Indians.

13.4.5 Notice of Employee Rights. All employers subject to this Ordinance shall prominently display a notice to all employees and

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

applicants for employment of their rights under this Ordinance and other tribal departmental grievance procedures.

**13.4.6 Employer Retaliation Prohibited.** It shall be violation of this Ordinance for any employer to take any adverse personnel or hiring action, or to retaliate in any way, against any person who attempts to exercise rights protected under this Ordinance. Employers found by the Commission, pursuant to an adjudicatory hearing, to have engaged in retaliation shall be subject to appropriate sanctions to be imposed by the Commission. The Commission may in its discretion either hold a hearing or file action in Tribal Court to review an allegation of unlawful retaliation. The Tribal Court is authorized to issue temporary injunctions for enforcement of this provision to prevent unlawful conduct.

### **13.5 ESTABLISHMENT OF TERO TAX AND FEES**

There is hereby established a TERO tax to be paid to the TERO Commission by each prime contractor, and by each employer operating within the exterior boundaries of the Hoopa Reservation, whose total contract or annual gross revenues is \$1,000.00 or more. The tax shall be equivalent to one percent (1%) of the total gross value of any contract performed within the Reservation or of the total annual gross revenues. The TERO tax may be paid in incremental payments, subject to the prior written approval of the Commission. The proceeds of the tax shall be placed in a separate account for use in implementing this Ordinance and shall be governed under guidelines approved by the Tribal Fiscal Department. A contractor or employer failing to pay the TERO Tax shall be subject to sanctions imposed by the Commission.

### **13.6 SPECIAL REQUIREMENTS FOR CONTRACTORS AND SUBCONTRACTORS**

The requirements of this Section apply to all employers engaging in commercial or employment activities within the Reservation pursuant to public or private contract:

#### **13.6.1 Certification by Commission**

Any contractor or subcontractor claiming eligibility for Indian preference under this title shall submit documentation acceptable to the Commission, pursuant to its authority under

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

Section 13.3.2 (B)(3), that is an Indian firm as defined in Section 13.2.4.

**13.6.2 Indian Preference Plan**

Each contractor shall include in its bid an Indian Preference plan for the master contract and any subcontracts. The plan shall indicate the name of the proposed subcontractor, whether it is an Indian-owned firm and if not, information on the good faith steps taken to identify Indian firms for the subcontract. A contractor may not refuse to employ an Indian subcontractor for the reason of price so long as the Indian firm's price is within five percent (5%) of the lowest bid, calculated by multiplying the lowest bid by 105%. A contractor may not refuse to employ an Indian subcontractor for the reason that a non-Indian firm is more qualified so long as the Indian firm satisfies the threshold requirements for technical qualifications.

**13.6.3 Failure to Submit Indian Preference Plan**

An apparent successful bidder who fails to submit an Indian preference plan prior to award of the contract shall be considered a non-responsive bidder for the purpose of awarding the contract.

**13.6.4 Amendments to Plan**

If awarded the bid, the contractor may not deviate from the plan or add or delete any existing new subcontracts or subcontractors without the written consent of the Contracting Officer or his designee and notice to the Commission. Any amendments to the Indian Preference Plan must be in writing and approved prior to the date of implementation.

**13.6.5 Bid Shopping Prohibited**

A contractor is prohibited from engaging in bid shopping as a means of avoiding its Indian subcontract preference obligations. Bid shopping is defined as any practice which a bidder or contractor informs a prospective subcontractor that it will receive a subcontract only if it offers a price lower than that proposed by another firm.

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

### 13.7 JOB CATEGORIES

Employers or subcontractors employed by a primary contractor under one or more contracts totaling at least \$10,000 shall not participate in more than one area of the overall project for which such employer or subcontractor is employed. A superintendent or any person in a similar capacity employed by the primary contractor shall not be employed in any other aspect of said project.

#### 13.7.1 Identification of Regular, Permanent Employees

Prospective contractors and bidders shall identify regular, permanent employees, including those included in subcontractors, in the bid package. Such employees may be employed on the project whether or not they are Indian. A regular, permanent employee is one who is and has been on the contractor's or subcontractor's annual payroll, or is an owner of the firm. The fact that an individual has worked for the contractor on previous projects shall not of itself qualify that individual as a regular, permanent employee. Exceptions for superintendents and other key personnel may be granted by the Commission on a case-by-case basis. Any contractor or subcontractor which fills vacant employment positions in its organization immediately prior to undertaking work pursuant to a contract on the Hoopa Reservation shall provide evidence acceptable to the Contracting Officer and the Commission that such actions were not intended to circumvent the provisions of this Ordinance.

#### 13.7.2 Lay-Offs

No Indian Worker shall be laid off as long as a non-Indian worker in the same craft is still employed, no as long as the Indian meets threshold qualifications for the job, unless such non-Indian has been employed for more than 90 days longer than such Indian. If the contractor lays off by crews, qualified Indians shall be transferred to any crew that will be retained, as long as there are non-Indians in the same craft employed elsewhere on the Reservation under the same contract.

#### 13.7.3 Existing Contracts, Employers

Any existing contracts or other work presently operating under an agreement with the Tribal Employment Rights Office will continue under the same written guidelines and rules. Each employer shall provide to the Commission a list of employees and their Indian

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

affiliation, if any, as part of the implementation of this Ordinance.

#### 13.7.4 Reporting Requirements

Each employer shall submit monthly reports to the Commission on a form provided indicating the number of employees, including a separate tally of Indians, it has on its work force, monthly hires and fires, and other information as may be identified on the form. An employer who fails to submit monthly reports shall be subject to sanctions provided under this Ordinance.

### 13.8 IMPLEMENTATION

In implementing the requirements of this Ordinance, the Commission may:

#### 13.8.1 Numerical Hiring Goals

Impose numerical hiring goals and timetables that specify the minimum number of Indians an employer must hire.

#### 13.8.2 Training Programs

Require employers to establish or participate in such training programs as the Commission determines necessary in order to increase the pool of qualified Indians on the Hoopa Reservation. Such training programs must have prior approval from the Contracting Officer and should preferably be included in the bid package. If training programs are not included in the bid package, the Commission shall give due consideration to the increase in cost, if any, for performing the program.

13.8.3 Attend and monitor all job interviews as a non-voting participant.

13.8.4 Prohibit an employer from establishing extraneous qualification criteria or other requirements that serve as barriers to Indian employment.

13.8.5 Enter into agreements, subject to approval by the Hoopa Business Council, with unions and other employers to insure compliance with this Ordinance.

ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

13.8.6 Require employers to give preference in the award of contracts and subcontracts to Indian-owned firms and businesses.

13.8.7 Establish programs to provide counseling and support to Indian Workers to assist them to retain employment. Employers may be required to participate in and/or cooperate with such support and counseling programs.

13.8.8 Issue Permits

Issue permits for implementation and provisions of this Ordinance and other agreements entered into under the authority of this Ordinance.

13.9 ENFORCEMENT BY TERO COMMISSION

In implementing this Ordinance the Commission shall have the following powers of enforcement:

13.9.1 Investigation, Monitoring

To investigate and monitor complaints, concern, and inquiries regarding Indian preference and other employment related concerns.

13.9.2 Issue Notices of Non-Compliance and Compliance Orders

To issue notices of non-compliance with this Ordinance or other rules, regulations, or policies of an employer, Council, or other tribal entity, and to issue such orders as reasonably necessary to remedy the non-compliance.

13.9.3 Citations, Subpoenas, and Penalties

To issue citations and subpoenas to employers regarding violations of this Ordinance or other written personnel policies of the Council or tribal entities, and to impose such civil penalties, including fines, as may be reasonably necessary to remedy the consequences of a violation of this Ordinance or to deter future violations.

13.9.4 Hearings

To hold such hearing as may be necessary to resolve complaints

ORDINANCE NO. 2-80, AS AMENDED  
APRIL 27, 1995  
SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE

and hear concerns regarding the matters covered under this Ordinance.

13.9.5 File and Defend Cases in Tribal Court

To bring or defend a complaint in Tribal Court for enforcement of this Ordinance, personnel policies of the Council, or other tribal entity against any employer within the exterior boundaries of the Hoopa Reservation.

13.10 TRIBAL COURT

Appeals of decisions of the TERO Commission may be filed under the rules of the Tribal Court. The Tribal Court is hereby authorized to hear and dispose of complaints and other actions brought under this Ordinance and other personnel policies of the Council and other entities.

13.11 LEGAL REPRESENTATION

In carrying out its responsibilities under this Title, the Commission shall consult with the Legal Department, and may request representation in proceedings in Tribal Court in complex cases, in cases of major impact, or in other cases as the workload of the Commission and the Legal Department warrant. There is hereby established a presumption, rebuttable only upon a clear written explanation by the Legal Department that no ethical conflict in interest is present, in which the Tribal Chairman and in his discretion the Council concerns, that the Legal Department shall not defend any entity of the Tribe in a proceeding before the TERO Commission or in Tribal Court.

13.12 PRINCIPLES OF CONSTRUCTION; SEVERABILITY; SOVEREIGN IMMUNITY PRESERVED

13.12.1 This Ordinance is remedial legislation intended to rectify the long-standing problem of severe under-employment of Hoopa tribal members and other Indians living in the Reservation community. Accordingly, it is to be construed liberally to achieve its purposes. Doubtful issues are to be resolved in favor of a right to file a grievance and to obtain judicial review.



ORDINANCE NO. 2-80, AS AMENDED

APRIL 27, 1995

SUBJECT: STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND  
APPLICATION OF INDIAN PREFERENCE


13.12.2 If any part of this Ordinance is found to be invalid for any reason, it is the intent of the Council that the remaining provisions remain in force to the maximum extent possible, and that they continue to be construed according to the provisions of this Section.

13.12.3 Except as expressly provided herein, nothing in this Ordinance is to be construed as a waiver of the Tribe's sovereign immunity from unconsented lawsuit, nor as consent by the Tribe to bring an action against the Tribe, its officers, or any of its departments or entities.

C E R T I F I C A T I O N

I, the undersigned, as Chairman of the Hoopa Valley Business Council, do hereby certify: that the Hoopa Valley Business Council is composed of eight members, of which six (6) were present, constituting a quorum, at a Regular Meeting thereof, duly and regularly called, noticed, convened, and held this 27th day of April, 1995; that this Ordinance was adopted at said meeting by a vote of five (5) for and none (0) against; and that since its adoptions this Ordinance has not been altered, rescinded, or amended in any way.

DATED THIS 27TH DAY OF APRIL, 1995.

  
DALE RISLING, CHAIRMAN  
HOOPA VALLEY TRIBAL COUNCIL

ATTEST:

  
PAMELA HAMMOND, EXECUTIVE SECRETARY  
HOOPA VALLEY TRIBAL COUNCIL

RESOLUTION OF THE HOOPA VALLEY TRIBE  
HOOPA INDIAN RESERVATION  
HOOPA, CALIFORNIA

RESOLUTION NO: 91-71 A, AS AMENDED

DATE APPROVED: MARCH 6, 1995

SUBJECT: ESTABLISHING COMPLAINT PROCEDURES FOR THE HOOPA TRIBAL  
EMPLOYMENT RIGHTS COMMISSION.

WHEREAS: The Hoopa Valley Tribe did on June 20, 1972, adopt a Constitution and Bylaws which was approved by the Commissioner of Indian Affairs on August 18, 1982, and this Constitution and Bylaws authorized the Hoopa Valley Business Council to enact ordinances promote the general welfare of the Hoopa Valley Tribe; and

WHEREAS: The Tribal Council did on April 19, 1990, did adopt Ordinance No. 2-80, Tribal Employment Rights Ordinance, as amended; and

WHEREAS: The procedures contained herein establish a fair and uniform internal process for how complaints are to be handled by the Tribal Employment Rights Commission.

NOW THEREFORE IT BE RESOLVED: That the Hoopa Valley Business Council does hereby adopt the Complaint Procedures for the Hoopa Tribal Employment Rights Commission.

I. PURPOSE

The purpose of these procedures is to establish clear and uniform procedures for handling complaints and other matters before the Tribal Employment Rights Office Commission. These procedures are intended to be guidelines for the TERO Commission and interested individuals and shall be subject to the provisions of the overriding authority of the Tribal Employment Rights Ordinance.

## II. PROCEDURES FOR FILING COMPLAINTS

### (a) Filing of Complaint

Any individual, group of individuals, organization, business or entity who believes any covered employer or entity, or the Commission has violated any requirements established in the Tribal Employment Rights Ordinance or regulations issued pursuant to it, may file a complaint with the TERO Director. The complaint may be typed or handwritten, provided that handwritten complaints must be legible after photocopying, and shall provide such information as is necessary to enable the Commission to carry out an investigation.

### (b) Complaint Investigation

The Director shall investigate and report to the Commission on every complaint and every appeal of employee grievance decisions under the Personnel Policies and Procedures filed with the Office. If upon investigation, the Commission determines there is a reason to believe a violation has occurred or the Director determines that the employee grievance remains unresolved, the Commission may schedule a hearing on the matter or may take enforcement actions as provided by the Tribal Employment Rights Ordinance. Within fifteen (15) work days after receipt of the complaint, and as needed thereafter, the Director shall provide the complaining or appealing party a written report on the results of the investigation. The report shall include a clear explanation of the Commission's preliminary findings and recommendations (or, in employee grievance appeals, the Director's findings and recommended decision), and the parties' right to a hearing before the Commission. This time period may be adjusted upon mutual agreement of the parties.

## III. INVESTIGATIONS

The Commission, shall investigate as deemed necessary to determine whether any covered employer or other entity has violated any provision of the TERO or any rule, order, or other instrument issued pursuant to it. Such investigation shall be carried out by the director. The director may enter, during working hours, the place of business or employment of any employer for the purpose of such investigation, and may require the covered employer or entity to submit such reports and other information as he/she deems necessary to monitor compliance with the requirements of the TERO and rules issued pursuant to it. The director shall also

investigate appeals of employee grievances in an effort to conciliate them. The director shall make a written report and recommendation as to each investigation.

#### IV. HEARING BEFORE THE COMMISSION

If requested by the complaining or appealing party or covered employer or entity, within ten (10) work days, after the mailing of a written report of the investigation, or on its own initiative, the Commission shall conduct a hearing on any matter before the Commission no later than thirty (30) work days after receipt of the request. Such hearing may be for enforcement action, to hear input on proposals, to hear appeals of the Director's recommended decisions on employee grievances, or may be in furtherance of an investigation of a matter before the Commission. Hearing notices shall be sent by first-class mail to each of the identified parties involved in the matter and shall be publically notices at least fifteen (15) work days before the hearing date. The Commission shall designate a hearing officer to preside over the hearing. Commissioners shall not be shown copies of investigative reports concerning employee grievances.

#### V. POWER TO REQUIRE TESTIMONY AND PRODUCE RECORDS

For the purpose of investigations, hearings and following up on complaints, which in the opinion of the Commission, are necessary and proper for the enforcement of the Ordinance, the TERO Commission Chairman may administer oaths or affirmations, subpoena witnesses, take evidence, and require by citation, the production of books, papers, contracts, agreements and other documents, records or information ;which the Commission deems necessary or material to the inquiry.

#### VI. ENFORCEMENT OF ORDINANCE

##### (a) Complaint Sustained

When, after conducting an investigation, the Commission determines that a violation of the TERO has occurred, the Commission shall notify the covered employer or entity in writing, specifying the violation. The Commission may withhold any names of the complaining party if there is substantial reason based on the record of the investigation to believe such party will be subject to retaliation. The Commission shall seek to achieve a informal settlement that results in satisfactory action by the employer or entity that resolves the violation. If the Commission is unable to informally resolve the matter, the Commission shall issue a

formal notice of non-compliance, which shall also advise the party of his/her right to a hearing before the Commission.

**(b) Issuance of Notice of Non-Compliance**

The formal notice of non-compliance shall set out the nature of the violation and the steps that must be taken to comply with the TERO. It shall provide the employer or entity with a reasonable time, which in no event shall be less than five (5) days from the date of receipt of such notice, to comply, unless the Commission, based on consultation with the Office of Tribal Attorney, has reason to believe irreparable harm will occur during that period, in which case the Commission may require that compliance occur within fewer than five (5) days. Any person, department or entity receiving a notice of non-compliance may request a hearing before the Commission which shall be held no sooner than five (5) work days and no more than twenty (20) work days, at the Commission's discretion, after the date for compliance set forth in the Commission's non-compliance notification.

**(c) Requirement to Post Bond**

If the party requests a hearing and the Commission, based on consultation with the Office of Tribal Attorney, believes there is a danger that the requesting the hearing will remove itself or its property from the jurisdiction of the Tribe prior to the hearing date, it may, at its discretion, require the party to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be assessed against the party.

If the party fails or refuses to post said bond, the Commission may petition the Hoopa Tribal Court for such interim and injunctive relieve as is appropriate to protect the rights and interests of the Commission and other parties during the pendency of the complaint and hearing proceedings.

**(d) Hearing Procedures**

Any hearing held pursuant to the TERO shall be conducted by the Commission or their authorized agent. Conduct of the hearing shall be governed by rules of practice and procedure that may be adopted by the Commission or Tribal Council. The Commission shall not be bound by technical rules of evidence under TERO, and no informality in any proceeding shall be cause for invalidation of any order, decision, rule or regulation made, approved or confirmed by the Commission,

except as may be provided under Tribal law. Each hearing shall be recorded and kept on file in the Office.

**(e) Action of the Commission**

If it is determined that a violation has occurred, the Commission may take action against the party as prescribed in the TERO. Actions that result in work closures should normally be taken after other methods of resolving the matter have not achieved satisfactory results. The Commission's decision shall be in writing and shall be served on each of the identified parties no later than fifteen (15) work days after the close of the hearing. If the Commission requires a transcript to assist it in making a decision, the hearing will be deemed closed upon its receipt. Once served with the decision, if a party fails or refuses to comply with the decision and failure to comply may cause irreparable harm to any party to the matter or property, the Commission may seek injunctive relief from the Hoopa Tribal Court to preserve the rights of the Commission, any parties, or property.

**(f) Tribal Court Review**


Any party to the matter may request review of the final decision of the TERO Commission in Hoopa Tribal Court. A request for review may also be filed against the prevailing party and the Commission if the Commission failed to act within the time periods set forth in Sections II (b) and IV above, unless extended by mutual agreement among the parties. In a case where the Commission has failed to act, for the purpose of adjudicating the action, the Court shall deem the previous action upon which the matter was before the Commission as the final action of the Commission. A request for Tribal Court review shall be filed in the Tribal Court no later than twenty (20) work days from the date of the receipt of the decision of the Commission from the date the Commission fails to act. Any proceeding in Tribal Court shall be governed by rules and procedures provided in the Tribal Code and Rules of Court. The Court shall uphold the decision of the Commission unless it is proven that the decision of the Commission is arbitrary, capricious or not in accordance with law. If the decision of the Commission is reversed or modified, the Court shall direct the Commission as to further action in the matter.

C E R T I F I C A T I O N

I, the undersigned, as Chairman of the Hoopa Valley Business Council do hereby certify that the Hoopa Valley Business Council is composed of eight members of which 5 were present constituting a quorum at a special meeting thereof; duly and regularly called, noticed, and convened, and held this 6th day of March, 1995; and that this Ordinance was duly adopted by a vote of 4 for and 0 against, and that said resolution has not been rescinded or amended in any way.

DATED THIS 6TH DAY OF MARCH, 1995

  
DALE RISLING, CHAIRMAN  
HOOPA VALLEY TRIBAL COUNCIL

ATTEST:   
PAMELA HAMMOND, EXECUTIVE SECRETARY  
HOOPA VALLEY TRIBAL COUNCIL

RESOLUTION THE HOOPA VALLEY TRIBE  
HOOPA INDIAN RESERVATION  
HOOPA, CALIFORNIA

RESOLUTION NO: 91-71 B

DATE APPROVED: MAY 30, 1991

SUBJECT: ESTABLISHING BYLAWS OF THE HOOPA TRIBAL EMPLOYMENT RIGHTS  
COMMISSION.

WHEREAS: The Hoopa Valley Tribe did on June 20, 1972, adopt a Constitution and Bylaws which was approved by the Commissioner of Indian Affairs on August 18, 1972, and this Constitution and Bylaws authorized the Hoopa Valley Business Council to enact ordinances promote the general welfare of the Hoopa Valley Tribe, and

WHEREAS: The Tribal Council did on April 19, 1990, did adopt Ordinance No. 2-80, Tribal Employment Rights Ordinance, as amended, and

WHEREAS: The procedures contained herein establish a process through which the business and affairs of the Tribal Employment Rights Office shall be managed.

NOW THEREFORE BE IT RESOLVED: That the Hoopa Valley Business Council does hereby adopt the Bylaws of the Hoopa Tribal Employment Rights Commission.

BYLAWS OF THE TERO COMMISSION

ARTICLE I - TERO COMMISSION

Section 1. General Powers - The business and affairs of the Tribal Employment Rights Office (hereinafter "TERO") shall be managed by the TERO Commission (hereinafter "Commission").

Section 2. Office Hours - The regular office hours of the Tribal Employment Rights Office shall be 8:00 am until 5:00 pm. If for any reason the office does not remain open to the general public during that period, the Commission shall designate an interim TERO agent to serve until the Director's return.

Section 3. Regular Meetings - The Commission shall have regular meetings at 7:00 pm on the second and fourth Tuesdays of each month.

Section 4. Special Meetings/Hearings - Special meetings of the Commission may be called by the Commission Chairman or by at least



two (2) Commissioners. Hearing shall be called by a majority affirmative vote of the Commission.

Section 5. Notice of Meetings/Hearings

(a) Meetings - Notice of any meeting shall be made by written notice, including a proposed agenda of the meeting, delivered personally at least two (2) days or mailed first-class mail to each Director at his address at least 4 days before the meeting, and shall be publically noticed for that same period. Any Commissioner may waive notice of any meeting.

(b) Hearings - Notice of any hearing shall be made by written notice delivered by first-class mail at least two (2) weeks to first-class mail to each named party and shall be publically noticed for that same period.

Section 6. Quorum - 3 Commissioner shall constitute a quorum for the transaction of business at any meeting of the TERO Commission.

Section 7. Manner of Acting - The act of the majority of the Commission present at a meeting at which a quorum is present shall be the act of the TERO Commission.

Section 8. Vacancies - Any vacancy of the TERO Commission shall be filled by the affirmative vote of a majority of the Hoopa Tribal Council. A Commissioner appointed to fill a vacancy shall serve for the unexpired term of his/her predecessor.

Section 9. Compensation - The TERO Commission may be paid such compensation as may be approved by resolution of the Hoopa Tribal Council. The Commission shall be eligible for additional compensations as provided under Tribal law for such expenses as vehicle mileage, per diem, los. of wages, etc.

Section 10. Removal of Commissioners - A Commissioner may be removed by the Tribal Council for cause or for missing miss three (3) consecutive regular meetings of the Commission without being excused by the Commission. A Commissioner removed for cause by the Tribal Council shall have the right to a hearing before the Council within ten (10) working days to present evidence why that Commissioner should not be removed. The hearing decision of the Council shall be final.

ARTICLE II - COMMISSION OFFICERS

Section 1. Number - The Commission at its initial meeting shall elect from its membership a Vice-Chairman and Secretary who shall serve for a one-year (1) term. Such other officers may be elected by the Commission as may be needed.

Section 2. Removal - Any officer of the Commission may be removed by a majority vote of the Commission for cause.

Section 3. Vacancies - A vacancy in any office may be filled by the Commission for the unexpired portion of the term.

Section 4. Commission Chairman - The Chairman of the Commission shall be the TERO Director. The Chairman shall preside at all meetings of the Commission unless excused by that body. He/she may sign with the Secretary, or any other officer authorized by the Commission, any contracts or other instruments which the Commission has authorized to be executed. In general, the Chairman shall perform all duties as prescribed by the Commission, from time to time. The Chairman shall be a non-voting member of the Commission.

Section 5. Vice-Chairman - In the absence of the Chairman or in the event of his inability or refusal to act, the Vice-Chairman shall perform the duties of the Chairman and when so acting shall have all powers of, and be subject to all restrictions of the Chairman, provided however, that the Vice-Chairman shall vote on matter before the Commission. In addition, he shall perform such other duties as shall, from time to time, be assigned to him/her by the Commission. However, while acting as the TERO Chairman, the Vice-Chairman shall not be entitled to wages and other benefits that may be available to the position of Director, as an employee.

Section 6. Secretary - The Secretary shall record, or cause to have recorded, and maintain a full report of all proceedings of each meeting of the Commission and shall in general perform all duties as may, from time to time, be assigned to him/her by the Commission, and shall witness all contracts.

### ARTICLE III - FINANCES, CONTRACTS, LOANS, CHECKS

Section 1. Finances - The finances and financial reports for the TERO Commission shall be under the direct supervision of the Director and Tribal Fiscal Department. The Director shall report on financial activities of the Tribal Employment Rights Office and provide any information requested by the Commission. The Director shall prepare for Commission approval annual budgets and modifications thereto, proposals and other documents needed for the operations of the Office.

Section 2. Contracts - The Commission may authorize any officer or agent of the TERO Commission to enter into any contract or agreement, or execute and deliver any instruments in the name of or on behalf of the Commission, and such authority may be general, or confined to specific assurances, for the purpose of enforcing the Tribal Employment Rights Ordinance or to conduct the necessary operations of the Office. The Secretary of the Commission shall witness all contracts. The Commission or its authorized agents shall not enter into any contract that purports to waive the sovereign immunity of the Commission as a Tribal entity or of the Hoopa Valley Tribe, unless the waiver of immunity is approved by the Tribal Council.

Section 3. Loans - No loan shall be contracted on behalf of the

Commission and no evidences of indebtedness shall be issued in the name of the Commission unless authorized by a resolution of the Commission. Such authority may be general or confined to specific assurances.

Section 4. Checks, Drafts, etc. - All checks, drafts, or other orders for the payment of money, or notes or other evidence of indebtedness issued in the name of the Commission shall be signed by an officer or officers, agents of the Commission and in such manner as shall, from time to time, be determined by a the Commission, and shall be in conformance with the Budget Ordinance of the Hoopa Tribe.


#### ARTICLE VI - AMENDMENTS


Section 1. Amendments - Amendments to these Bylaws may be made by the Tribal Council upon receipt of a proposal by the TERO Commission in accordance with the Legislative Procedures Act of the Hoopa Valley Tribe.

#### C E R T I F I C A T I O N

I, the undersigned, as Chairman of the Hoopa Valley Business Council do hereby certify that the Hoopa Valley Business Council is composed of eight members of which 6 were present constituting a quorum at a special meeting thereof; duly and regularly called, noticed, and convened, and held this 30th day of May, 1991; and that this Ordinance was duly adopted by a vote of 5 for and 0 against, and that said resolution has not been rescinded or amended in any way.

DATED THIS 30TH DAY OF MAY, 1991

  
\_\_\_\_\_  
DALE RISLING, CHAIRMAN  
HOOPA VALLEY BUSINESS COUNCIL

ATTEST:   
\_\_\_\_\_  
CHRISTENA PHILLIPS, EXECUTIVE SECRETARY  
HOOPA VALLEY BUSINESS COUNCIL

RESOLUTION OF THE HOOPA VALLEY TRIBE  
HOOPA VALLEY INDIAN RESERVATION  
HOOPA, CALIFORNIA

RESOLUTION NO. 91-147

DATE APPROVED: September 26, 1991

SUBJECT: AMENDMENT OF TRIBAL EMPLOYMENT RIGHTS ORDINANCE REGARDING  
ROLE OF OFFICE OF TRIBAL ATTORNEY

WHEREAS: The Hoopa Valley Tribe adopted a Constitution and Bylaws (Tribal Constitution) on June 20, 1972, which was approved by the Commissioner of Indian Affairs on August 18, 1972, and which was "ratified and confirmed" by Congress in Section 8 of P.L. 100-580; and

WHEREAS: Article V of the Tribal Constitution, as amended, establishes that the Hoopa Valley Tribal Council is the governing body of the Tribe; and

WHEREAS: The Tribal Council has enacted Ordinance No. 2-80, as amended April 19, 1990, known as the Tribal Employment Rights Ordinance, which provides, among other things, for the TERO Commission to hear appeals of personnel actions taken by the Tribe and tribal departments and entities; and

WHEREAS: Section 13.11 of the TERO Ordinance, which governs legal representation of the TERO Commission, was enacted at a time when only one Tribal Attorney was employed by the Tribe, and imposes restrictions on the legal representation of the Tribe and tribal departments and entities in personnel matters, which restrictions are unnecessary and unduly burdensome when more than one Tribal Attorney is employed by the Tribe; and

WHEREAS: The professional conduct of attorneys employed on the Hoopa Valley Reservation by the Tribe is subject to regulation by the Tribe and, pursuant to 25 C.F.R. Part 89, by the United States; and

WHEREAS: Lack of legal representation by a Tribal Attorney for the Tribe and its departments and entities in personnel matters poses an immediate threat to tribal resources and assets, and immediate action is necessary to provide for needed legal representation.

NOW THEREFORE BE IT RESOLVED THAT: Section 13.11 of the Tribal Employment Rights Ordinance is amended to read as follows:

RESOLUTION NO. 91-147  
DATE APPROVED: September 26, 1991  
SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding  
role of Office of Tribal Attorney

PAGE 2

### 13.11 LEGAL REPRESENTATION

In carrying out its responsibilities under this Title, the Commission shall consult with a Tribal Attorney, and may request representation by a Tribal Attorney in proceedings in Tribal Court in complex cases, in cases of major impact, or in other cases as the workload of the Commission and the Office of Tribal Attorney warrant. The fact that a Tribal Attorney has advised the Tribe or a tribal department or entity on a personnel matter, or represents the Tribe or a tribal department or entity before the TERO Commission or the Tribal Court on a personnel matter, shall not preclude another Tribal Attorney from advising and representing the TERO Commission on the same matter, if:

(a) the Tribal Attorney advising and representing the TERO Commission has not been personally and substantially involved in the matter on behalf of the Tribe or the tribal department or entity taking the personnel action; and

(b) files on the matter kept by each of the two Tribal Attorneys are segregated and are not readily accessible to the other attorney; and

(c) the two Tribal Attorneys have not discussed the matter substantively and have not shared with each other confidential or privileged information related to the matter, and do not do so during the pendency of the matter before the TERO Commission or any appeal therefrom.

BE IT FURTHER RESOLVED THAT: This amendment is enacted pursuant to Section 6.10 of the Legislative Procedures Act and shall take effect immediately. This amendment shall be routed to tribal departments promptly for departmental comments pursuant to the Legislative Procedures Act, and shall be placed on the Tribal Council agenda for permanent enactment within thirty days.

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### CERTIFICATION

I, the undersigned, as Chairman of the Hoopa Valley Tribal Council,

RESOLUTION NO. 91-147

DATE APPROVED: September 26, 1991

SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding  
role of Office of Tribal Attorney

PAGE 3

do hereby certify: that the Hoopa Valley Tribal Council is composed of eight (8) members of which six (6) were present, constituting a quorum, at a Regular Meeting thereof, duly and regularly called, noticed, convened, and held on this 26th day of September, 1991; that this Resolution was duly adopted by a vote of five (5) in favor, none (0) opposed, and none (0) abstaining; and that since its approval this Resolution has not been rescinded, amended, or modified in any way.

DATED THIS 26TH DAY OF SEPTEMBER, 1991.

  
\_\_\_\_\_  
DALE RISLING, CHAIRMAN  
HOOPA VALLEY TRIBAL COUNCIL

ATTEST:

  
\_\_\_\_\_  
DEIRDRE R. YOUNG, TRIBAL SECRETARY  
HOOPA VALLEY TRIBAL COUNCIL

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RESOLUTION OF THE HOOPA VALLEY TRIBE  
HOOPA VALLEY INDIAN RESERVATION  
HOOPA, CALIFORNIA

RESOLUTION NO. 91-180

DATE APPROVED: November 21, 1991

SUBJECT: AMENDMENT OF TRIBAL EMPLOYMENT RIGHTS ORDINANCE REGARDING  
ROLE OF OFFICE OF TRIBAL ATTORNEY

WHEREAS: The Hoopa Valley Tribe adopted a Constitution and Bylaws (Tribal Constitution) on June 20, 1972, which was approved by the Commissioner of Indian Affairs on August 18, 1972, and which was "ratified and confirmed" by Congress in Section 8 of P.L. 100-580; and

WHEREAS: Article V of the Tribal Constitution, as amended, establishes that the Hoopa Valley Tribal Council is the governing body of the Tribe; and

WHEREAS: The Tribal Council has enacted Ordinance No. 2-80, as amended April 19, 1990, known as the Tribal Employment Rights Ordinance, which provides, among other things, for the TERO Commission to hear appeals of personnel actions taken by the Tribe and tribal departments and entities; and

WHEREAS: Section 13.11 of the TERO Ordinance, which governs legal representation of the TERO Commission, was enacted at a time when only one Tribal Attorney was employed by the Tribe, and imposes restrictions on the legal representation of the Tribe and tribal departments and entities in personnel matters, which restrictions are unnecessary and unduly burdensome when more than one Tribal Attorney is employed by the Tribe; and

WHEREAS: The professional conduct of attorneys employed on the Hoopa Valley Reservation by the Tribe is subject to regulation exclusively by the Tribe and, pursuant to 25 C.F.R. Part 89, by the United States; and

WHEREAS: This action is taken following compliance with the Legislative Procedures Act of the Hoopa Valley Tribe.

NOW THEREFORE BE IT RESOLVED THAT: Section 13.11 of the Tribal Employment Rights Ordinance is amended to read as follows:

13.11 LEGAL REPRESENTATION

In carrying out its responsibilities under this Title,

RESOLUTION NO. 91-180

DATE APPROVED: November 21, 1991

SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding  
Role of Office of Tribal Attorney

the Commission shall consult with a Tribal Attorney, and may request representation by a Tribal Attorney in proceedings in Tribal Court in complex cases, in cases of major impact, or in other cases as the workload of the Commission and the Office of Tribal Attorney warrant. The fact that a Tribal Attorney has advised the Tribe or a tribal department or entity on a personnel matter, or represents the Tribe or a tribal department or entity before the TERO Commission or the Tribal Court on a personnel matter, shall not preclude another Tribal Attorney from advising and representing the TERO Commission on the same matter, if:

(a) the Tribal Attorney advising and representing the TERO Commission has not been personally and substantially involved in the matter on behalf of the Tribe or the tribal department or entity taking the personnel action; and

(b) files on the matter kept by each of the two Tribal Attorneys are segregated and are not readily accessible to the other attorney; and

(c) the two Tribal Attorneys have not discussed the matter substantively and have not shared with each other confidential or privileged information related to the matter, and do not do so during the pendency of the matter before the TERO Commission or any appeal therefrom.

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#### CERTIFICATION

I, the undersigned, as Chairman of the Hoopa Valley Business Council, do hereby certify: that the Hoopa Valley Business Council is composed of eight (8) members of which seven (7) were present, constituting a quorum, at a Regular Meeting thereof, duly and regularly called, noticed, convened, and held on this twenty-first day of November, 1991; that this Resolution was duly adopted by a



RESOLUTION NO. 91-180  
DATE APPROVED: November 21, 1991  
SUBJECT: Amendment of Tribal Employment Rights Ordinance regarding  
Role of Office of Tribal Attorney

vote of six (6) in favor, none (0) opposed, and none (0)  
abstaining; and that since its approval this Resolution has not  
been rescinded, amended, or modified in any way.

DATED THIS TWENTY-FIRST DAY OF NOVEMBER, 1991.

  
\_\_\_\_\_  
DALE RISLING, CHAIRMAN  
HOOPA VALLEY BUSINESS COUNCIL

ATTEST:   
\_\_\_\_\_  
DEIRDRE R. YOUNG, EXECUTIVE SECRETARY  
HOOPA VALLEY BUSINESS COUNCIL

112191  
hvt.res. 91-180

# Title 15

## Labor

CHAPTER	SECTION
1. [Reserved] . . . . .	1
3. Office of Navajo Labor Relations . . . . .	201
4. Navajo Nation Labor Commission . . . . .	301
5. [Reserved] . . . . .	401
7. Navajo Preference in Employment Act . . . . .	601
9. Child Labor . . . . .	801
11. Workers' Compensation . . . . .	1001
13. Crownpoint Institute of Technology . . . . .	1201

### Chapter 1. [Reserved]

#### HISTORY

Note. Former Chapter 1, "Office of Labor" (CF-22-75, February 21, 1975), was superseded by the current Navajo Nation Division of Human Resources. For current information see the Division of Human Resources Plan of Operation. Also see Enabling Legislation for the Division of Human Resources in Title 2 of the Navajo Nation Code.

### Chapter 3. Office of Navajo Labor Relations

#### SECTION

- 201. Establishment
- 202. Purposes
- 203. Personnel
- 204. Authority, duties and responsibilities
- 205. Avoidance of ex parte communications
- 206. Place of office
- 207. Amendment

#### § 201. Establishment

The Office of Navajo Labor Relations ("ONLR") was originally established by CJA-4-72 and underwent a name change in 1976 to the Division of Equal Opportunity and Employment. The original name as the Office of Navajo Labor Relations was reinstated and its Plan of Operation amended by ACJY-134-85.

#### HISTORY

- ACJY-159-87, July 21, 1987.
- ACJY-134-85, July 18, 1985.
- CJA-4-72, §1, January 19, 1972.

#### § 202. Purposes

The purposes of the ONLR are as follows:

- A. To monitor and enforce the Navajo Preference in Employment Act ("NPEA").
- B. To implement and carry out the labor policies of the Navajo Nation as established by the Navajo Nation Council.
- C. To act as an administrative agency for matters relating to employment preference in hiring, recruitment, promotion, layoff, termination, transfer and other areas of employment.
- D. To gather information from employers, employees, labor organizations, and governmental agencies relating to employment, compensation, and working conditions.
- E. To recommend and propose policies, rules, regulations, and guidelines, concerning labor and employment to the Human Services Committee and the Navajo Nation Council.
- F. To assist and encourage, where appropriate, the peaceful settlement of labor disputes within the territorial jurisdiction of the Navajo Nation.

#### HISTORY

- ACJY-159-87, July 21, 1987.
- ACJY-134-85, July 18, 1985.
- CJA-4-72, §1, January 19, 1972.
- Note. Slightly reworded for purposes of statutory form.

#### CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

#### § 203. Personnel

- A. There is established the position of Director, ONLR, and such other positions as may from time to time be budgeted by the Navajo Nation Council or by any other source available and acceptable to the Division of Human Services.
- B. The Director of ONLR shall be hired by the Executive Director of the Division of Human Resources. All other department personnel will be hired by the Director of ONLR. Hiring and compensation shall be in accordance with Navajo Nation personnel policies and procedures.
- C. The Director of ONLR shall report and be responsible to the Executive Director of the Division of Human Services.

## HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, §1, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

### § 204. Authority, duties and responsibilities

ONLR shall have the powers necessary and proper to carry out the purposes set forth in §202 of this Plan of Operation. ONLR is hereby authorized and directed:

A. To ensure that all employers are complying with the NPEA in the employment and training of enrolled members of the Navajo Nation;

B. To recommend appropriate services for the employment of Navajos desiring work with employers;

C. To monitor and enforce Navajo labor laws, rules, policies and regulations;

D. To recommend laws, rules, regulations, guidelines and policies as may be necessary to accomplish the purposes of the NPEA;

E. To require employers to submit such reports and information as deemed necessary to carry out the purposes of the NPEA;

F. To report annually to the Navajo Nation Council, and quarterly to the Human Services Committee, the extent to which employers are complying with the NPEA;

G. To assist in coordinating such education and job training programs as necessary to provide qualified Navajo workers for employers;

H. To ensure appropriate preferential employment and training provisions are included in all agreements entered into by employers;

I. To establish minimum employment and labor provisions (including employment, registered apprenticeship participation, wages, promotion, termination, grievance procedures, and related employment matters) for inclusion in all agreements entered into by employers;

J. To investigate and make administrative determinations concerning compliance by employers with the NPEA or labor provisions in contracts, subcontracts, leases, permits or other agreements;

K. To file formal complaints with the Navajo Nation Labor Commission (the "Commission"), participate as complainant in hearings held by the Commission and make application to the Commission for subpoenas requiring the attendance and testimony of persons or witnesses and production of documents; and

L. To take all necessary action to accomplish the purposes of the NPEA.

## HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

## CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

### § 205. Avoidance of ex part communications

Except as otherwise permitted or required by law, ONLR and ONLR's legal counsel shall take reasonable measures to avoid: (a) disclosure to members, staff and legal counsel of the Commission of specific factual or legal issues concerning alleged violations of the NPEA under investigation by ONLR and not a matter of record before the Commission; and (b) ex parte communications to Commission members, staff or legal counsel concerning a pending proceeding before the Commission without notice to the respondent employer which is a party in such proceeding.

## HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

### § 206. Place of office

ONLR shall have its main office in Window Rock, Navajo Nation (Arizona). ONLR may also establish sub-offices at such other locations as the Director, in consultation with the Executive Director of the Division of Human Services, deems appropriate.

## HISTORY

ACJY-159-87, July 21, 1987.

ACJY-134-85, July 18, 1985.

CJA-4-72, January 19, 1972.

Note. Slightly reworded for purposes of statutory form.

### § 207. Amendment

Upon recommendation by the Human Services committee, this Plan of Operation may be amended from time to time as deemed necessary by the Government Services Committee of the Navajo Nation Council.

## HISTORY

ACJY-159-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

## CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

### Chapter 4. Navajo Nation Labor Commission

SECTION

- 301. Establishment
- 302. Purposes
- 303. Organization
- 304. Authority, duties and responsibilities
- 305. Meeting procedure
- 306. Staff
- 307. Place of office
- 308. Amendment

§ 301. Establishment

A. The Board of Directors of the Office of Navajo Labor Relations (the "Board") was originally established by CJA-4-72 and underwent a name change in 1976 to the Board of Directors of the Division of Equal Opportunity and Employment. The Board's original name was reinstated and its Plan of Operation amended by ACJY-134-85.

B. The Board is continued under the name Navajo Nation Labor Commission (the "Commission") and shall have the powers prescribed in this Plan of Operation, as well as such additional powers as may be granted to the Commission by law.

HISTORY

- ACJY-160-87, July 21, 1987.
- ACJY-134-85, July 18, 1985. (Previously codified as the "Board of Directors" at 15 NNC §203).
- CJA-4-72, January 19, 1972.
- Note. Slightly reworded for purposes of statutory form.

§ 302. Purposes

The purposes of the Commission shall be to:

- A. Act as the administrative hearing body under the Navajo Preference in Employment Act.
- B. Conduct and hold administrative hearings in accordance with applicable Navajo Nation laws concerning Navajo employment preference.
- C. Process and decide all formal complaints filed before it.
- D. Adopt rules and regulations for Commission hearings.

HISTORY

- ACJY-160-87, July 21, 1987.

§ 303. Organization

The Commission shall consist of five members.

A. Membership. The Commission shall consist of: (a) two (2) members appointed by the Human Services Committee of the Navajo Nation Council with the concurrence of the Government Services Committee of the Navajo Nation Council; and (b) three (3) members appointed by the President of the Navajo Nation with the concurrence of the Government Services Committee.

B. Commission Members Qualifications. The two members appointed by the Human Services Committee and the three members of the Commission appointed by the President of the Navajo Nation shall be familiar with labor practices and requirements of the Navajo Nation. One appointed member shall be a Navajo worker familiar with union practices. The Executive Director of the Division of Human Services, the Directors of any department within the Division of Human Services, employees of the Division of Human Services or its departments, and Council Delegates shall not be eligible to serve as members of the Commission.

C. Officers. The officers of the Commission shall be elected every four (4) years from among the Commission by a majority vote of the Commission and shall consist of a Chairperson, Vice-Chairperson, and Secretary.

1. Chairperson. The Chairperson of the Commission shall preside at meetings of the Commission, assure orderly meetings in accordance with accepted parliamentary rules, and sign all documents as required for action of the Commission.

2. Vice-Chairperson. The Vice-Chairperson shall serve in the absence of the Chairperson and in the performance of this service shall exercise all the powers and bear all the responsibilities of the Chairperson.

3. Secretary. The Secretary shall fulfill all legal obligations of the Commission, and carry out such duties as may be prescribed. In the absence of the Chairperson and Vice-Chairperson, the Secretary shall preside at all meetings of the Commission.

D. Term of Office. Each member of the Commission shall serve for a term of four (4) years and until his or her successor is appointed.

E. Commission Vacancies:

1. Any Commission member may resign by submitting thirty (30) days prior written notice of their resignation and such resignation shall be accepted by the Commission at the next Commission meeting.

2. Any member of the Commission shall be removed from the Commission if:

a. Such member has been convicted of any crime reflecting upon such member's honesty or ability to fulfill the fiduciary obligations imposed by law upon such member; or

b. Such member violates the disclosure of conflicts of interest requirements set forth below:

(1) No contract or other transaction between any Commission member and any employer, company, person, corporation, association, partnership, joint venture, labor union, governmental organization or entity of any kind in which one or more of the Commission members has an interest directly or indirectly shall be valid for any purpose, unless the entire interest of that person or the Board of Directors of such entity is fully disclosed to the Commission and the proposed contract or transaction is approved by the affirmative vote of at least a majority of the entire Commission who are not so interested. The Commission shall submit any such contract or transaction for further approval at any regular meeting of the Ethics and Rules Committee of the Navajo Nation Council. Any such contract or transaction which is approved by a vote of the majority of the Ethics and Rules Committee of the Navajo Nation Council shall be valid and binding upon the parties.

(2) The Commission shall submit any contract or transaction wherein a Navajo Nation officer or employee may have any interest directly or indirectly in the matter or transaction to any regular meeting of the Ethics and Rules Committee of the Navajo Nation Council for approval. Any such contract or transaction which is approved by a vote of the majority of the Ethics and Rules Committee of the Navajo Nation Council shall be valid and binding upon the parties.

(3) This section shall be subject to any subsequent requirements or regulations adopted pursuant to the Navajo Nation Ethics in Government Law.

3. In the event a Commission member is found to be in violation of §303(E)(2), such member shall be forthwith removed from his or her position, effective upon written notice of removal by the Chairperson of the Commission. The Commission shall promptly submit the appropriate information and facts concerning the violation and removal to the authority (the President of the Navajo Nation or the Human Services Committee) which appointed such member.

4. In the event a vacancy is created on the Commission by reason of resignation, removal or any other reason, such vacancy shall be filled by the authority which is authorized to appoint members to such vacant seat, in accordance with the procedure prescribed in

§303(A) and (B). Appointment of a replacement member shall be made within thirty (30) days after the date the appointing authority receives written notification of the vacancy.

#### HISTORY

IGRMA-59-93, March 15, 1993.

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

#### CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*  
Government Services Committee of the Navajo Nation Council, 2 NNC §343 (B)(3).

### § 304. Authority, duties and responsibilities

The Commission is authorized and directed to:

- A. Submit an annual report of its activities to the Human Services Committee, the Intergovernmental Relations Committee and the Navajo Nation Council;
- B. Formulate overall administrative and operating policies pertaining to the function of the Commission;
- C. Regulate the course of hearings and conduct of participants;
- D. Administer oaths and affirmations;
- E. Rule on motions and other procedural matters;
- F. Grant applications for subpoenas and rule on petitions to revoke subpoenas;
- G. Inquire fully into all issues and obtain a complete record upon which Commission decisions can be rendered;
- H. Receive, rule on, exclude, and limit evidence, lines of questioning, or testimony which are irrelevant, immaterial, or unduly repetitious;
- I. Examine witnesses for the purpose of clarification of the facts and issues;
- J. Direct the submission of briefs and set the time for the filing thereof;
- K. Issue findings of fact, conclusions of law and order, and impose appropriate damages, sanctions, fines and other relief for non-compliance;
- L. Set the amount of bond and such appropriate conditions thereto as the Commission may deem necessary;
- M. Prepare and submit an annual budget; and
- N. Exercise such other authority as may be conferred by law.

#### HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

## CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*  
Intergovernmental Relations Committee of the Navajo Nation Council, 2 NNC §824 (B)(1)

## § 305. Meetings; procedure

A. Meetings shall be called by the Chairperson of the Commission for business transactions or as required by pending cases filed before the Commission. Three (3) members of the Commission shall constitute a quorum for the transaction of business.

B. The Commission may hold meetings with the Human Services Committee of the Navajo Nation Council for informational and coordinating purposes as it deems appropriate.

C. The Commission shall adopt rules for the conduct of its meetings and keep a record of all its proceedings and transactions. All formal substantive action shall be taken by written resolution duly certified by the presiding officer, or memorialized by written memorandum setting forth the action taken.

D. Members of the Commission may receive compensation and shall be reimbursed for expenses (per diem and mileage at the Navajo Nation rate) incurred in connection with the performance of their duties. All Commission expenses shall be paid from the budget of the Commission.

## HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

## CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*

## § 306. Staff

The Commission may employ independent legal counsel and staff as it deems necessary or appropriate to carry out the duties and responsibilities herein set forth. The duties of the staff shall include all administrative responsibilities of the Commission including recording and transcription of hearings.

## HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

## § 307. Place of office

The Commission shall have its office and staff located in Window Rock, Navajo Nation, (Arizona).

## HISTORY

ACJY-160-87, July 21, 1987.

## § 308. Amendment.

This Plan of Operation may be amended from time to time by the Intergovernmental Relations Committee of the Navajo Nation Council. Prior to any such amendment, the Human Services Committee shall review and recommend any change or proposed amendment to this Plan of Operation.

## HISTORY

ACJY-160-87, July 21, 1987.

Note. Slightly reworded for purposes of statutory form.

## CROSS REFERENCES

Human Services Committee of the Navajo Nation Council, 2 NNC §601 *et seq.*  
Intergovernmental Relations Committee of the Navajo Nation Council, 2 NNC §824 (B)(1).

## Chapter 5. [Reserved]

### HISTORY

ACJY-126-60, July 20, 1960.

ACJN-74-60, June 13, 1960.

Note. Previous Chapter 5, "Wages", §§401-401, repealed by CD-79-82, December 16, 1982.

## Chapter 7. Navajo Preference in Employment Act

### HISTORY

Former Chapter 7. Former Chapter 7 was repealed in its entirety by CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

CAU-39-63, August 20, 1963.

CA-54-58, August 26, 1958.

### SECTION

- 601. Title
- 602. Purpose
- 603. Definitions
- 604. Navajo employment preference
- 605. Reports
- 606. Union and employment agency activities; rights of Navajo workers
- 607. Navajo Prevailing wage
- 608. Health and safety of Navajo workers
- 609. Contract compliance
- 610. Monitoring and enforcement
- 611. Hearings
- 612. Remedies and sanctions
- 613. Appeal and stay of execution
- 614. Non-Navajo spouses
- 615. Polygraph test
- 616. Rules and regulations
- 617. Prior inconsistent law repealed
- 618. Effective date and amendment of the Act
- 619. Severability of the Act

### § 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

### HISTORY

CO-78-90, October 25, 1990.

CAU-63-85, §1, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

### § 602. Purpose

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;
2. To provide training for the Navajo People;
3. To promote the economic development of the Navajo Nation;
4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;
5. To foster the economic self-sufficiency of Navajo families;
6. To protect the health, safety, and welfare of Navajo workers; and
7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.

B. It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above.

### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

### § 603. Definitions

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 NNC §254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the sole purpose of co-counseling in association with a person described in clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

#### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### § 604. Navajo employment preference

A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this §604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the Act. In the event of a required joint plan by an employer and associated labor organization, only the non-complying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omis-



sions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act, provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and *bona fide* seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

## HISTORY

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

## § 605. Reports

All employers doing business or engaged in any project or enterprise within the territorial jurisdiction of the Navajo Nation or pursuant to a contract with the Navajo Nation shall submit employment information and reports as required to ONLR. Such reports, in a form acceptable to ONLR, shall include all information necessary and appropriate to determine compliance with the provisions of this Act. All reports shall be filed with ONLR not later than ten (10) business days after the end of each calendar quarter, provided that ONLR shall have the right to require filing of reports on a weekly or monthly schedule with respect to part-time or full-time temporary employment.

## HISTORY

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

## § 606. Union and employment agency activities; rights of Navajo workers.

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.

B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

## HISTORY

CO-73-90, October 1990.  
CAU-63-85, August 1, 1985.

## § 607. Navajo prevailing wage

A. Definitions. For purposes of this section, the following terms shall have the meanings indicated:

1. The term "prevailing wage" shall mean the wage paid to a majority (more than 50 percent) of the employees in the classification on similar construction projects in the area during a period not to exceed 24 months prior to the effective date of the prevailing wage rate set hereunder; provided that in the event the same wage is not paid to a majority of the employees in the classification, "prevailing wage" shall mean the average of the wages paid, weighted by the total number of employees in the classification.

2. The term "prevailing wage rate" shall mean the rate established by ONLR pursuant to this section.

3. The term "wage" shall mean the total of:

a. The basic hourly rate; and

b. The amount of: (a) contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a *bona fide* fringe benefit fund, plan or program for the benefit of employees; and (b) costs to the contractor or subcontractor which may be reasonably anticipated in providing *bona fide* fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the employees affected. The types of fringe benefits contemplated hereunder include medical or hospital health care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeships or other similar programs; or other *bona fide* fringe benefits.

4. The term "area" in determining the prevailing wage means the geographic area within the territorial jurisdiction of the Navajo Nation; provided that in the event of insufficient similar construction projects in the area during the period in question, "area" shall include the geographic boundaries of such contiguous municipal, county or state governments as ONLR may determine necessary to secure sufficient wage information on similar construction projects.

5. The term "classifications" means all job positions in which persons are employed, exclusive of classifications with assigned duties which are primarily administrative, executive or clerical, and subject to satisfaction of the conditions prescribed in §§607(E)(7) and (8), exclusive of "apprentice" and "trainee" classifications as those terms are defined herein.

6. "Apprentice" means: (a) a person employed and individually registered in a *bona fide* apprenticeship program registered with the

U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with an Apprenticeship Agency administered by a state or Indian Tribe and recognized by the Bureau; or (b) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a state or Tribal Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

7. "Trainee" means a person: (a) registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration; or (b) employed and/or receiving on-the-job training under a public employment or work experience program which is approved and funded by the Navajo Nation.

8. The term "construction" shall mean all activity performed under a contract which relates to: (a) the building, development, rehabilitation, repair, alteration or installation of structures and improvements of all types, including without limitation buildings, bridges, dams, plants, highways, sewers, water mains, powerlines and other structures; (b) drilling, blasting, excavating, clearing and landscaping, painting and decorating; (c) transporting materials and supplies to or from the site of any of the activities referred to in (a) or (b) by employees of the contractor or subcontractor; and (d) manufacturing or finishing materials, articles, supplies or equipment at the construction site of any of the foregoing activities by employees of the contractor or subcontractor.

9. The term "contract" shall mean the prime construction contract and all subcontracts of any tier thereunder entered into by parties engaged in commercial, business or governmental activities (whether or not such activities are conducted for profit).

**B. Establishment of wage rates.**

1. For all construction reasonably anticipated to occur in the area on a regular basis, ONLR shall establish a general prevailing wage rate for each classification within specified types of construction. ONLR shall define classifications and types of construction in accordance with guidelines generally recognized in the construction industry. In all cases where construction is contemplated for which prevailing wage rates have not been set, the contract letting entry shall submit to ONLR a written request for a project prevailing wage scale. Such request shall be submitted not less than 60 days prior to

the scheduled date for bid solicitation and shall include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR shall use its best efforts to provide a project prevailing wage scale for each classification involved in the project construction within 60 days after receipt of a request therefor.

2. In setting prevailing wage rates, ONLR shall conduct such surveys and collect such data as it deems necessary and sufficient to arrive at a wage determination. Wage data may be collected from contractors, contractors' associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area, including the names and addresses of contractors and subcontractors; the locations, approximate costs, dates and types of construction; the number of workers employed in each classification on the project; and the wage rates paid such workers. Wage rate data for the area may be provided, and considered in making wage determinations, in various forms including signed statements, collective bargaining agreements and prevailing wage rates established by federal authorities for federally-assisted construction projects.

3. Any classification of workers not listed in a prevailing wage rate and which is to be used under a construction contract shall be classified in conformance with the prevailing wage determination issued and applicable to the project; provided that an additional classification and prevailing wage rate therefor will be established in the event each of the following criteria are satisfied:

a. The work performed by the proposed classification is not performed by a classification within the existing prevailing wage scale;

b. The proposed classification is utilized in the area by the construction industry; and

c. The wages set for the proposed classification bear a reasonable relationship to the wage rates contained in the existing scale for other classifications.

4. Subject to the prior written approval thereof by the Director of ONLR, a general prevailing wage rate shall be effective on the date notice of such rate is published in a newspaper in general circulation in the Navajo Nation. The notice shall contain the following information:

(1) The fact a prevailing wage rate has been set and approved in writing by the Director of ONLR;

(2) The type of construction for which the rate was established;

(3) The effective date, described as the date of publication of the notice or other specified date;

(4) The address and telephone number of ONLR; and

(5) A statement that ONLR will provide a copy of the full wage determination on request, and respond to any reasonable questions regarding such determination or its application.

a. General prevailing wage rates shall continue in effect until such time as any modifications are adopted.

b. A prevailing wage rate for a particular project shall be effective on the date of issuance to the requesting party of a written wage determination approved by the Director of ONLR. The wage determination shall continue in effect for the duration of the project; provided that any such determination may be modified by ONLR in the event the period of time from the effective date of the determination to the date bids are solicited exceeds 180 days and the estimated date of completion of the project is more than one year after the effective date of the determination.

c. Project and general wage determinations may be modified from time to time, in whole or in part, to adjust rates in conformity with current conditions, subject to the special conditions applicable to project determinations. Such modifications become effective upon the same terms and conditions which are applicable to original determinations.

d. Fringe benefits. The fringe benefit amount of wages reflected in a prevailing wage rate shall be paid in cash to the employee, and shall not be deducted from such employee's wages, unless each of the following conditions is satisfied:

(1) The deduction is not contrary to applicable law;

(2) A voluntary and informed written consent authorizing the deduction is obtained from the employee in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining or continuing employment;

(3) No profit or other benefit is obtained as a result of deduction, directly or indirectly, by the contractor, subcontractor or any person affiliated with them in the form of a commission, dividend or other consideration; and

(4) The deduction serves the convenience and interests of the employee.

C. No contract-letting entity, contractor or subcontractor shall proceed with a construction contract subject to this section in the absence of a contractual requirement for payment of prevailing wages pursuant

to a specified wage determination issued by ONLR. Violation of this obligation shall render the contract-letting entity, and the employer contractor or subcontractor, jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, together with interest thereon (or if no prevailing wage rates have been set, such wage rate as may be issued by ONLR during the course, or after the completion, of the construction project).

1. Failure by any employer, contractor or subcontractor to pay prevailing wages shall render such employer liable for the difference between the amount of wages actually paid and the prevailing rate, together with interest thereon.

2. Any deduction of fringe benefits by an employer contractor or subcontractor in violation of §607(C) shall render such employer liable for the amount of such deduction, together with interest thereon.

3. Upon written request of ONLR, a contract-letting entity or contractor, as the case may be, shall withhold from any monies payable on account of work performed by an employer contractor or subcontractor under a construction contract such sums as may be determined by ONLR as necessary to satisfy any liabilities of such contractor or subcontractor for unpaid prevailing wages or wrongful deduction of fringe benefits.

4. If following a hearing under §611 a contract-letting entity (other than the Navajo Nation), contractor or subcontractor is found to have willfully violated this section the Commission may enter a debarment order disqualifying such party from receiving any contract, or subcontract thereunder, with the Navajo Nation for a period not to exceed three years.

5. The liabilities described in this §607(C) shall not foreclose the Commission from awarding such other relief or imposing such other civil penalties as may be appropriate following a hearing conducted under §611.

D. Exemptions. This section shall not apply to:

1. A contract associated with a construction activity which relates to the provision of architect, engineer, legal or consultant services, or, except as provided under §607(A)(8)(d), the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or any of its subcontractors.

2. A construction contract relating to a project having a total cost of \$2,000 or less.

3. A construction contract which is let by a natural person who is an owner or person legally authorized to let such contract, for such person's personal, family or household purposes.

4. A construction contract to the extent the work thereunder is performed by employees of the owner, or employees of the person or entity legally authorized to let the prime contract.

5. A construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act, 40 U.S.C., §§276(a) *et seq.*, (as amended), or other federal law applicable to such project.

6. A construction contract to the extent such contract requires payment of wages pursuant to a wage scale established under a collective bargaining agreement between any contractor or subcontractor and a labor organization.

7. With the exception of the provisions of §607(C), an apprentice, provided that the apprentice is paid not less than: (a) the basic hourly rate prescribed in the registered program for the apprentice's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of §607(A)(6)), shall be paid wages in an amount of not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

8. With the exception of the provisions of §607(C), a trainee provided that the trainee is paid not less than: (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of §607(A)(7)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

**HISTORY**

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

**§ 608. Health and safety of Navajo workers**

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

**HISTORY**

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

**§ 609. Contract compliance**

A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents"), which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.

B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

**HISTORY**

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

**§ 610. Monitoring and enforcement**

A. Responsible Agency. Compliance with the Act shall be monitored and enforced by ONLR.

### B. Charges.

1. **Charging Party.** Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a claim that respondent is engaging in a pattern of conduct or practice in violation of rights guaranteed by the Act. An individual Charge and ONLR Charge are collectively referred to herein as a "Charge".

2. **Form and Content.** A Charge shall be in writing, signed by the charging party (which shall be the Director of ONLR in the case of an ONLR Charge), and contain the following information:

a. The name, address any telephone number of the charging party;

b. The name and address or business location of the respondent against whom the Charge is made.

c. A clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complaint of;

d. With respect to a Charge alleging a pattern or practice in violation of the Act, the period of time during which such pattern or practice has existed and whether it continues on the date of the Charge;

e. The specific harm sustained by the charging party in the case of an Individual Charge or the specific harm sustained by specified Navajos or a class of Navajos with respect to an ONLR Charge; and

f. A statement disclosing whether proceedings involving the alleged violation have been initiated before any court or administrative agency or within any grievance process maintained by the respondent, including the date of commencement, the court, agency or process and the status of the proceeding.

g. ONLR shall provide assistance to persons who wish to file Individual Charges. Notwithstanding the foregoing provisions, a Charge shall be deemed sufficient if it contains a reasonably precise identification of the charging party and respondent, and the action, pattern or practice which are alleged to violate the Act.

3. **Place of Filing.** Individual Charges may be filed in any ONLR office. An ONLR Charge shall be filed in ONLR's administrative office in Window Rock.

4. **Date of Filing.** Receipt of each Individual Charge shall be acknowledged by the dated signature of an ONLR employee which shall be deemed the date on which the Individual Charge is filed. The date on which an ONLR Charge is signed by the ONLR Director shall be deemed the date of filing for such Charge.

5. **Amendment.** A Charge may be amended by filing, in the office where the Charge was first submitted, a written instrument which sets forth the amendment and any portions of the original Charge revised thereby. To the extent the information reflected in the amendment arose out of the subject matter of the original Charge, the amendment shall relate back and be deemed filed as of the filing date of such Charge. Any portion of the amendment which does not qualify for relation back treatment shall constitute a new Charge.

6. **Time Limitation.** A Charge shall be filed within one year after accrual of the claim which constitutes the alleged violation of the Act. The date of accrual of a claim shall be the earlier of:

a. The date on which the charging party had actual knowledge of the claim; or

b. Taking into account the circumstances of the charging party, the date on which the charging party should reasonably have been expected to know of the existence of the claim; provided, however, that a Charge relating to a continuing, or pattern or practice, violation of the Act shall be filed within one year after the later of:

(1) The date of termination of such violation, pattern or practice; or

(2) The date of accrual of the claim to which the Charge relates. Failure to file a Charge within the time limitations prescribed herein shall bar proceedings on the related claim before the Commission or in any Court of the Navajo Nation; provided, however, that nothing herein shall be interpreted as foreclosing proceedings before any Navajo Court or administrative body (other than the Commission) on any claim which also arises under applicable common, statutory or other law independent of this Act.

7. **Notice to Respondent.** Within 20 days after a Charge is filed, ONLR shall serve a copy thereof on respondent; provided, however, that if in ONLR's judgment service of a copy of the Charge would impede its enforcement functions under the Act. ONLR may in lieu of a copy serve on respondent a notice of the Charge which contains the date, place and summary of relevant facts relating to the alleged violation, together with the identity of the charging party unless withheld for the reason stated above. Service of any amendment to

the Charge shall be accomplished within 20 days after the amendment is filed. Failure of ONLR to serve a copy of a Charge or notice thereof within the prescribed time period shall not be a ground for dismissal of the Charge or any subsequent proceedings thereon.

8. Withdrawal of Charge.

a. ONLR may, in its discretion, withdraw any ONLR Charge upon written notice thereof to respondent and each person identified in the Charge whose rights under the Act were alleged to have been violated. Any person receiving notice of withdrawal or any other person who asserts a violation of his or her rights as a result of the violation alleged in the withdrawn ONLR Charge may file an Individual Charge which, if filed within 90 days after the issuance date of ONLR's withdrawal notice, shall relate back to the filing date of the ONLR Charge.

b. Any charging party may, in his or her discretion, withdraw an Individual charge by filing a written notice of withdrawal with the ONLR Office where the Charge was submitted, with a copy thereof filed with the ONLR administrative office in Window Rock. ONLR shall, within 20 days after receiving the notice, transmit a copy to the respondent. Within 90 days after receipt of the withdrawal notice, ONLR may file an ONLR Charge relating in whole or part to the violations alleged in the withdrawn Individual Charge. Any filing of an ONLR Charge within the prescribed time period shall relate back to the filing date of the withdrawn Charge.

9. Overlapping Charges. Nothing herein shall be construed as prohibiting the filing of any combination of Individual Charges and an ONLR Charge which, in whole or part, contain common allegations of violations of the Act.

10. Informants. Irrespective of whether a person is otherwise eligible to file an Individual Charge, any such person or an organization may in lieu of filing a Charge submit to ONLR written or verbal information concerning alleged violations of the Act and may further request ONLR to file an ONLR Charge thereon. In addition to other limitations on disclosure provided in §610(M) and in the absence of the written consent of the informant, neither the identity of the informant nor any information provided by such informant shall be disclosed to the respondent, agents or legal counsel for the respondent, or the public, either voluntarily by ONLR or pursuant to any discovery or other request for, or order relating to, such information during the course of any judicial or non-judicial proceeding, including a proceeding before the Commission or any subsequent appeal or challenge to a Commission or appellate deci-

sion; provided, however, that in the event the informant is called as a witness by ONLR at a Commission proceeding involving the information provided by the informant:

a. The informant's name may be disclosed, but his or her status as an informant shall remain privileged and confidential and shall not be disclosable through witness examination or otherwise; and

b. With the exception of the witness status as an informer, information provided by the informant is disclosable in accordance with the procedures outlined under §610(M).

C. Investigation of Charges.

1. ONLR shall conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the act has been violated.

2. Subpoenas.

a. The Director of ONLR shall have the authority to sign and issue a subpoena compelling the disclosure by any person evidence relevant to a Charge, including a subpoena ordering, under oath as may be appropriate:

(1) The attendance and testimony of witnesses;

(2) Responses to written interrogatories;

(3) The production of evidence, including without limitation books, records, correspondence or other documents (or lists or summaries thereof) in the subpoenaed person's possession, custody or control of which are lawfully obtainable by such person; and

(4) Access to evidence for the purposes of examination and copying. Neither an individual charging party nor a respondent shall have a right to demand issuance of a subpoena prior to the initiation of any proceedings on the Charge before the Commission, in which event subpoenas are issuable only pursuant to the procedures governing such proceedings.

b. Service of the subpoena shall be effected by one of the methods prescribed in §610(O). A subpoena directed to a natural person shall be served either on the person at his or her residence or office address or, in the case of personal delivery, at such residence or office either on the person subpoenaed or on anyone at least eighteen years of age (and in the case of office service, a person who is also an employee of such office). Service of a subpoena directed to any other person shall be addressed or delivered to either the statutory agent (if any) of such person or any employee occupying a managerial or supervisory position at any office of the person maintained within or outside the terri-

torial jurisdiction of the Navajo Nation. Personal service may be performed by a natural person at least eighteen years of age, including an employee of ONLR.

c. The subpoena shall set a date, time and place for the attendance of a witness, or production of or access to evidence, as the case may be, provided that the date for compliance shall be not less than 30 days after the date on which service of the subpoena was effected.

d. Any person served with a subpoena intending not to fully comply therewith shall, within five business days after service, serve on the Director of ONLR a petition requesting the modification or revocation of the subpoena and identifying with particularity each portion of the subpoena which is challenged and the reasons therefor. To the extent any portion of the subpoena is not challenged, the unchallenged parts shall be complied with in accordance with the terms of the subpoena as issued. The ONLR Director shall issue and serve on petitioner a decision and reasons therefor within eight business days following receipt of the petition, and any failure to serve a decision within such period shall be deemed a denial of the petition. In the event the Director's decision reaffirms any part of the subpoena challenged in the petition, the Director may extend the date for compliance with such portion for a period not to exceed 10 business days. Any petitioner dissatisfied with the decision of the ONLR Director shall either:

(1) Comply with the subpoena (with any modifications thereof reflected in the Director's decision); or

(2) Within five business days following receipt of the Director's decision or the date such decision was due, file a petition with the Commission (with a copy concurrently served on the ONLR Director) seeking modification or revocation of the subpoena and stating with particularity therein each portion of the subpoena challenged and the reasons therefor. A copy of the ONLR Director's decision, if any, shall be attached to the petition.

e. In the event a person fails to comply with a served subpoena, ONLR may petition the Commission for enforcement of the subpoena. For purposes of awarding any relief to petitioner, the Commission may issue any order appropriate and authorized in a case where it is established that a Commission order has been violated. A copy of the petition shall be concurrently served on the non-complying person.

f. Beginning on the first day of non-compliance with a subpoena served on a respondent, or any employee or agent of respondent, until the date of full compliance therewith, there shall be a tolling of all periods of limitation set forth in this section.

#### D. Dismissal of Charges.

1. Individual Charges. ONLR shall dismiss an Individual Charge upon reaching any one or more of the following determinations:

a. The Individual Charge, on its face or following an ONLR investigation, fails to demonstrate that probable cause exists to believe a violation of the Act has occurred;

b. The Individual Charge was not filed within the time limits prescribed by §610(B)(6);

c. The charging party has failed to reasonably cooperate in the investigation of, or attempts to settle, the Individual Charge;

d. The charging party has refused, within 30 days of receipt, to accept a settlement offer agreed to by respondent and approval by ONLR, which accords substantially full relief for the harm sustained by such party; or

e. The Charge has been settled pursuant to §610(G).

2. ONLR Charges. ONLR shall dismiss an ONLR Charge upon determining that:

a. No probable cause exists to believe a violation of the Act has occurred;

b. The Charge was not filed within the time limits prescribed by §610(B)(6); or

c. The Charge has been settled pursuant to §610(G).

3. Partial Dismissal. In the event a portion of a Charge is dismissable on one or more of the foregoing grounds, only such portion of the Charge shall be dismissed and the remainder retained by ONLR for final disposition.

4. Notice. Written notice of dismissal, stating the grounds therefor, shall be served on respondent and the individual charging party in the case of an Individual Charge or, in the case of an ONLR Charge, on the respondent and any person known to ONLR who claims to be aggrieved by the violations alleged in such Charge. Such notice shall be accompanied by a right to sue authorization pursuant to §610(H).

E. Probable Cause Determination. Following its investigation of a Charge and in the absence of a settlement or dismissal required under §610(D), ONLR shall issue written notice of its determination that probable cause exists to believe a violation of the Act has occurred or is occurring. Such notice shall identify each violation of the Act for which



probable cause has been found, and copies thereof shall be promptly sent to the respondent, the charging party in the case of an Individual Charge, and, in the case of an ONLR Charge, each person identified by ONLR whose rights are believed to have been violated. Any probable cause determination shall be based on, and limited to, the evidence obtained by ONLR and shall not be deemed a judgment by ONLR on the merits of allegations not addressed in the determination.

F. Conciliation. If, following its investigation of a Charge, ONLR determines there is probable cause to believe the Act has been or is being violated, ONLR shall make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion. In the event there is a failure to resolve the matter informally as to any allegations in an Individual Charge for which probable cause has been determined, ONLR shall either issue the notice prescribed in §610(H) or initiate a Commission proceeding under §610(I) concerning unresolved allegations. A successful resolution of any such allegation shall be committed to writing in the form required under §610(G). Nothing herein shall be construed as prohibiting ONLR from initiating or participating in efforts to informally resolve a Charge prior to issuance of a probable cause determination.

G. Settlement.

1. Settlement agreements shall be committed to writing and executed by respondent, the individual charging party if any and, in the case of any Charge, by the Director of ONLR. Refusal of an individual charging party to execute a settlement agreement subjects the Individual Charge to dismissal under the conditions set forth in §610(D)(1)(d). Settlement agreements may also be signed by those aggrieved persons identified as having a claim with respect to an ONLR Charge.

2. Settlement agreements hereunder shall be enforceable among the parties thereto in accordance with the terms of the agreement. Any member of a class of persons affected by the settlement who is not a signatory to the agreement shall have the right to initiate proceedings before the Commission pursuant to the procedure in §610(H)(2)(a)(3).

3. Each settlement agreement shall provide for the dismissal of the Charge to the extent the violations alleged therein are resolved under the agreement.

4. Any breach of a settlement agreement by respondent shall present grounds for filing a Charge under this section. A charging party asserting a claim for breach may either seek:

- a. Enforcement of that portion of the settlement agreement alleged to have been breached; or

b. In the case of a material breach as to any or all terms, partial or total rescission of the agreement, as the case may be, and such other further relief as may have been available in the absence of settlement. A Charge asserting a breach of a settlement agreement with respect to any original allegation in the Charge covered by such agreement shall, for purposes of all time limitations in this section, be deemed to arise on the accrual date of the breach.

H. Individual Right to Sue.

1. Individual Charges.

a. Prior to the expiration of 180 days following the date an Individual Charge was filed, ONLR, by notice to the individual charging party, shall authorize such individual to initiate a proceeding before the Commission in accordance with the procedures prescribed in §610(J), if:

(1) The Individual Charge has been dismissed by ONLR pursuant to §610(D)(1);

(2) ONLR has issued a probable cause determination under §610(E), there has been a failure of conciliation contemplated by §610(F), and ONLR has determined not to initiate a Commission proceeding on behalf of the individual charging party; or

(3) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed.

b. After the expiration of 180 days following the date an Individual Charge was filed, the individual charging party shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination, or commenced or concluded conciliation efforts.

2. ONLR Charges.

a. Prior to the expiration of 180 days following the date an ONLR Charge was filed, ONLR, by notice to any person known to it who claims to be aggrieved by the allegations presented in such Charge, shall authorize such person to initiate a proceeding before the Commission in accordance with the procedures prescribed in §610(J), if:

(1) The ONLR Charge has been dismissed by ONLR pursuant to §610(D)(2);

(2) ONLR has issued a probable cause determination under §610(E), there has been a failure of conciliation contemplated by §610(F), and ONLR has determined not to initiate a Commission proceeding on the Charge;

(3) ONLR has entered into a settlement agreement under §610(G) to which such aggrieved person is not a party; or

(4) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the ONLR Charge was filed.

b. After the expiration of 180 days following the date an ONLR Charge was filed and prior to the date on which ONLR commences a Commission proceeding, any person claiming to be aggrieved by the allegations presented in such Charge shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination or commenced or concluded conciliation efforts.

3. Content of Notice. A notice of right to sue shall include the following information:

a. Authorization to the individual charging party or aggrieved person to initiate a proceeding before the Commission pursuant to and within the time limits prescribed by §610(J);

b. A summary of the procedures applicable to the institution of such proceeding, or a copy of the Act containing such procedures;

c. A copy of the Charge; and

d. A copy of any written determination of ONLR with respect to such Charge.

4. ONLR Assistance. Authorization to commence Commission proceedings hereunder shall not prevent ONLR from assisting any individual charging party or aggrieved person in connection with Commission proceedings or other efforts to remedy the alleged violations of the Act.

1. ONLR Right to Sue.

1. Individual Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an Individual Charge with respect to which ONLR has issued a probable cause determination under §610(E) and there has been a failure of conciliation contemplated by §610(F). ONLR shall have such right notwithstanding that the individual charging party has a concurrent right to sue hereunder which has not been exercised. ONLR's right to sue shall continue until such time as the individual charging party

commences a Commission proceeding and, in that case, shall be revived in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Initiation of Commission proceedings by ONLR shall terminate the right to sue of an individual charging party, subject to revival of such right in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under §610(L).

2. ONLR Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an ONLR Charge with respect to which ONLR has issued a probable determination under §610(E) and there has been a failure of conciliation contemplated by §610(F). ONLR shall have such right notwithstanding that a person claiming to be aggrieved as a result of the allegations in the ONLR Charge has a concurrent right to sue hereunder which has not been exercised. In the event an aggrieved person first initiates a Commission proceeding in an authorized manner, ONLR's right to sue shall only expire as to such person and shall revive in the event the aggrieved person's proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under §610(L).

J. Initiation of Commission Proceedings. Proceedings before the Commission shall be initiated upon the filing of a written complaint by a petitioner with the Commission.

1. Complaints shall satisfy each of the following conditions:

a. The petitioner is authorized to file the Complaint under the terms and conditions prescribed by this section;

b. The underlying Charge was filed within the time limits prescribed in §610(B)(6); and

c. The complaint was filed within 360 days following the date on which the underlying Charge was filed.

2. Upon motion of respondent and a showing that any one or more of the foregoing conditions has not been satisfied, the Commission shall dismiss the complaint; provided, however, that no complaint shall be dismissed under (2) above as to any allegation of a pattern of conduct or practice in violation of the Act to the extent such pattern or practice continued to persist during the time limits prescribed in §610(B)(6); and provided further that, in the absence of dismissal or conclusion of Commission proceedings on the merits, nothing herein shall be construed as prohibiting the refiling of a Charge alleging the same or comparable pattern or practice viola-

tions of the Act which continued to persist during the time limits prescribed in §610(B)(6) for refiling such Charge.

**K. Preliminary Relief.** Prior to the initiation of Commission proceedings on a Charge and notwithstanding the failure to satisfy any precondition to such proceedings, either ONLR, an individual charging party or aggrieved person may, upon notice to respondent, petition the Commission for appropriate temporary or preliminary relief in the form of an injunction or other equitable remedy on the ground that prompt action is necessary to carry out the purposes of the Act, including the preservation and protection of rights thereunder. Nothing herein shall be construed as foreclosing a petition which seeks comparable relief subsequent to the commencement of Commission proceedings.

**L. Intervention in Commission Proceedings.** Within three business days after the date on which any complaint, or petition pursuant to §610(K), is filed with the Commission, other than a complaint or petition filed by ONLR, the Commission shall cause copies thereof to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have a unconditional right to intervene in the Commission proceeding initiated by such complaint or petition upon the timely application by motion accompanied by a pleading setting forth the claims for which intervention is sought.

**M. Confidentiality.**

**1. Conciliation.** In the absence of written consent of the persons concerned, statements or offers of settlement made, documents provided or conduct by participants in conciliation efforts under §610(F) shall not be admissible in any Commission or other proceeding relating to the Charge which is the subject of conciliation, to prove liability for or invalidity of the Charge or the amount or nature of relief therefor; provided, however, that nothing herein shall be construed as requiring the exclusion of such evidence merely because it was presented in the court of conciliation if:

- a. The evidence is otherwise discoverable; or
- b. The evidence is offered for another purpose, including without limitation, proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**2. Charge, Records and Information.**

a. Prior to the institution of Commission proceedings thereon, and in the absence of the written consent of the persons concerned, ONLR shall not disclose as a matter of public information any Charge, response thereto, any statements or other information obtained in the course of its investigation of the

Charge, except that nothing herein shall prevent earlier disclosure of such information by ONLR in its discretion:

(1) To charging parties or their attorneys, respondents or their attorneys, witnesses or other interested persons where the disclosure is deemed by ONLR to be necessary for securing a resolution of the Charge, including appropriate relief therefor; or

(2) To employees or representatives of the Navajo Nation or employees or representatives of federal, state or local authorities have a governmental interest in the subject matter of the Charge; or

(3) To persons for the purpose of publishing data derived from such information in a form which does not reveal the identity of charging parties, aggrieved persons, respondents or persons supplying the information.

b. Except as otherwise provided herein, any person to whom a permissible disclosure is made hereunder shall be bound to maintain the confidentiality of such information from further disclosure and shall use the information solely for the purpose for which it was disclosed.

**2. Privileged Information.** Neither ONLR, charging parties, aggrieved persons, respondents, witnesses or persons supplying information in connection with a Charge shall be compelled, either before or after commencement of Commission proceedings, to disclose any information which represents the opinions or conclusions formed by ONLR during the course of its investigation of a Charge, or any information which is protected by the attorney-client privilege, the informer's privilege referred to in §610(B)(10), or any other absolute or limited privilege recognized under the laws of the Navajo Nation. To the extent justice requires, the Commission may, balancing the rights of parties and affected persons, prohibit or limit the disclosure of any other information for good cause shown, including a showing that disclosure would impede enforcement of the Act, jeopardize rights guaranteed thereunder, or cause annoyance, embarrassment, oppression or undue burden or expense to parties or affected persons.

**N. Non-retaliation.** It shall be unlawful for any employer, labor organization, joint labor-management committee involved in apprenticeship or other matters relating to employment, employment agency or other person to, directly or indirectly, take or attempt to induce another person to take, any action adversely affecting:

1. The terms and conditions of any person's employment or opportunities associated with such employment;
2. An applicant's opportunity for employment;

3. The membership of an employee or applicant for employment in a labor organization; or

4. Any other right, benefit, privilege or opportunity unrelated to employment, because such person has opposed an employment practice subject to this Act or has made a charge, testified, or assisted or participated in any manner in an investigation, proceeding or hearing under the Act.

O. Service of Documents. Service of any notice, determination or other document required to be transmitted under this section shall be accomplished by personal delivery or certified mail, return receipt requested.

#### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

### § 611. Hearing

A. The Commission shall schedule a hearing within sixty (60) days of the filing of a written complaint by a petitioner with the Commission. The hearing shall be held at a location designated by the Commission.

1. Notice. The Commission shall issue a notice of hearing. The time and place of the hearing shall be clearly described in the notice. The notice shall also set forth in clear and simple terms the nature of the alleged violations and shall state that: (a) the violations may be contested at a hearing before the Commission; and (b) any party may appear by counsel and cross-examine adverse witnesses.

2. Upon application by a party to the Commission or on the Commission's own motion, the Commission may issue subpoenas compelling the disclosure by any person evidence relevant to the Complaint, including a subpoena ordering, under oath as may be appropriate:

- a. The attendance and testimony of witnesses;
- b. Responses to written interrogations;
- c. The production of evidence; and
- d. Access to evidence for the purpose of examination and copying.

3. The Commission is authorized to administer oaths and compel attendance of any person at a hearing and to compel production of any documents.

4. In the event a party does not make an appearance on the day set for hearing or fails to comply with the rules of procedure set forth by the Commission for the conduct of hearings, the Commission is authorized to enter a default determination against the non-appearing and/or non-complying party.

B. Burden of proof. In any compliance review, complaint proceeding, investigation, or hearing, the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by clear and convincing evidence.

C. Hearing. The Commission shall conduct the hearing in a fair and orderly manner and extend to all parties the right to be heard.

1. The Commission shall not be bound by any formal rules of evidence.

2. The respondent shall have the opportunity to answer the complaint and the parties shall have the right to legal counsel, to present witnesses, and to cross-examine adverse witnesses.

3. The Commission shall issue its decision by a majority vote of a quorum present which shall be signed by the Chairperson of the Commission.

4. Copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt.

5. Records of the proceeding shall be recorded. Any party may request a transcript of the proceeding at their own expense.

6. The decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.

#### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

### § 612. Remedies and sanctions

A. If, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall:

1. Issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of intentional violation, imposition of civil fines; provided that liability for back-pay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which is the basis for the complaint.

2. In the case of an individual suit initiated pursuant to §610(H), award costs and attorneys' fees if the respondent's position was not substantially justified.

3. Refer matters involving respondent contracts, agreements, leases and permits to the Navajo Nation Attorney General for appropriate action.

B. In the absence of a showing of good cause therefor, if any party to a proceeding under this Act fails to comply with a subpoena or order issued by the Commission, the Commission may impose such actions as are just, including without limitation any one or more of the following:

1. In the case of non-compliance with a subpoena of documents or witnesses:

a. An order that the matters for which the subpoena was issued or any other designated facts shall be deemed established for the purposes of the proceeding and in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

c. An order striking pleading or parts thereof, or staying further proceedings until the subpoena is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

2. In the case of non-compliance by a party or non-party with a Commission subpoena of documents or witnesses or with any other order of the Commission:

a. An order holding the disobedient person in contempt of the Commission and imposing appropriate sanctions therefor, including a civil fine; or

b. An order directing the disobedient person to pay the reasonable costs and/or attorneys fees caused by the non-compliance.

C. The person or party in whose favor a Commission's decision providing for remedial action is entered shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce the remedial action; provided that the Commission itself shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce civil fines or sanctions imposed by the Commission against a person or party. In both instances the Attorney General of the Navajo Nation shall have an unconditional right to intervene on behalf of the Navajo Nation. Any attempted enforcement of a Commission order or decision directing payment of money by the Navajo Nation or any of its governmental entities shall, with respect to the extent of any liability be governed by the Navajo Sovereign Immunity Act, 1 NNC §§551 *et seq.*, as amended.

#### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

Note. Slightly reworded for purposes of statutory form.

#### § 613. Appeal and stay of execution

A. Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court by lodging a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure and within ten (10) days after receipt of the Commission's decision.

B. In the absence of a stipulation by the parties approved by the Commission, a stay of execution of the decision from which the appeal is taken shall only be granted upon written application of the appellant to the Commission and an opportunity for response by appellee. The application for a stay shall be filed within the period prescribed for appeal in subsection (A) hereof. No stay shall be issued unless the appellant presents a clear and convincing showing that each of the following requirements have been satisfied:

1. Appellant is likely to prevail on the merits of the appeal;
2. Appellant will be irreparably harmed in the absence of a stay;
3. Appellee and interested persons will not be substantially harmed by a stay;

4. The public interest will be served by a stay; and

5. An appeal bond or other security, in the amount and upon the terms prescribed by subsection (C) below, has been filed with and approved by the Commission; provided that no appeal bond shall be required of ONLR, the Navajo Nation or any governmental agency or enterprise of the Navajo Nation.

C. The appeal bond shall be issued by a duly authorized and responsible surety which shall obligate itself to pay to appellee, or any other person in whose favor an award is made by the Commission decision, the amounts specified or described in the bond upon conclusion of the appeal and failure of appellant, following written demand by appellee, to satisfy the foregoing obligations.

1. The amount or nature of liability assumed by the surety shall be specified in the bond and shall include:

a. The total amount of all monetary awards made in the Commission decision, together with such interest thereon as may be prescribed in the Commission's decision;

b. Costs of appeal and attorneys' fees incurred by appellee in defending the appeal and which may be awarded to appellee by the Navajo Nation Supreme Court;

c. Damages sustained by appellee or other recipients of a Commission award for delay in satisfaction of the Commission decision caused by the appeal; and

d. Such other amount or liability reasonably required to be secured to protect the interests of the appellee or other award recipients.

2. The bond shall provide that the surety submits to the jurisdiction of the Commission and the Courts of the Navajo Nation, and irrevocably appoints the Commission as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion of the appellee filed with the Commission, with copies thereof served on the surety and appellant.

3. In lieu of posting an appeal bond, appellant may, with the approval of the Commission, post a cash bond and undertaking in the amount and upon the terms which are required above with respect to an appeal bond.

4. No appeal bond or cash bond and undertaking, nor the liabilities of the surety or appellant thereunder, shall be exonerated or released until all amounts and liabilities prescribed therein have been fully paid and satisfied.

D. Within three business days following the filing with the Navajo Nation Supreme Court of any appeal from a Commission proceeding, the Clerk of such Court shall, in all cases other than those in which ONLR is not either the appellant or appellee, cause copies of the notice of appeal and all other documents filed in connection therewith to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene and participate as *amicus* in the appeal proceedings upon timely application therefor by motion lodged with the Navajo Nation Supreme Court. ONLR's right of participation shall be coextensive with that of the parties to the appeal, including the right to file opening, answering and reply briefs, and the right to present oral argument to the Court.

#### HISTORY

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

#### § 614. Non-Navajo spouses

A. When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the application for Navajo preference consideration.

B. Upon meeting the above requirements, such consideration shall be limited to preference in employment where the spouse would normally be in a pool of non-Navajo workers. In this instance, Navajo preference would place the non-Navajo spouse in the applicant pool of Navajos for consideration. However, preference priority shall still be given to all Navajo applicants who meet the necessary job qualifications within that pool.

C. Non-Navajo spouses having a right to secondary preference under this section shall also have and enjoy all other employment rights granted to Navajos under the Act, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.

#### HISTORY

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

#### § 615. Polygraph test

A. No person shall request or require any employee or prospective employee to submit to, or take a polygraph examination as a condition of obtaining employment or of continuing employment or discharge or discipline in any manner an employee for failing, refusing, or declining to submit to or take a polygraph examination.

B. For purposes of this section, "polygraph" means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test, or question individuals for the purpose of determining truthfulness. This provision shall not apply to federal or state government employees.

#### HISTORY

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

Note. The words "lie detector" were changed to "polygraph".

#### § 616. Rules and regulations

The Human Services Committee of the Navajo Nation Council is authorized to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act. The Commission is hereby delegated the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under §611 of the Act, provided that such rules are consistent with the provisions of the Act.

#### HISTORY

CO-73-90, October 25, 1990.  
CAU-63-85, August 1, 1985.

## Chapter 9. Child Labor

### SECTION

801. Adherence to child-labor laws of states  
802. Authority to promulgate additional regulations

#### § 801. Adherence to child-labor laws of states

The Navajo Nation shall adhere as nearly as may be possible to the applicable child-labor laws of the states of Arizona, New Mexico and Utah on work projects within those portions of the Navajo Nation lying within each respective state.

##### HISTORY

CA-53-58, §1, August 29, 1958.

Note. Slightly reworded for purposes of statutory form.

#### § 802. Authority to promulgate additional regulations

The President of the Navajo Nation is authorized to promulgate such additional protective regulations with respect to child labor on the Navajo Nation as he or she deems necessary and proper to protect the best interests of the Navajo Nation.

##### HISTORY

CA-53-58, §2, August 29, 1958.

##### CROSS REFERENCES

The Human Services Committee of the Navajo Nation Council has the authority to promulgate regulations for the enforcement and implementation of the labor laws and policies of the Navajo Nation. 2 NNC §604(B)(1).

Note. Slightly reworded for purposes of statutory form.

#### § 617. Prior inconsistent law repealed

All prior Navajo Nation laws, rules, regulations, and provisions of the Navajo Nation Code previously adopted which are inconsistent with this Act are hereby repealed.

##### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### § 618. Effective date and amendment of the Act

A. The effective date of this Act shall be 60 days after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.

B. Any amendment or repeal of the Act shall only be effective upon approval by the Navajo Nation Council, and shall not be valid if it has the effect of amending, modifying, limiting, expanding or waiving the Act for the benefit or to the detriment of a particular person.

C. Any amendment to the Act, unless the amendment expressly states otherwise, shall be effective 60 days after the passage thereof by the Navajo Nation Council.

D. The time limits prescribed in §610 relating to filing a Charge and subsequent proceedings thereon were added by amendment adopted by the Navajo Nation Council subsequent to the effective date of the original Act. Notwithstanding an actual accrual date for any alleged violation of the Act which is prior to the effective date of the amendment which added the time limits in §610 hereof, such alleged violation shall be deemed to accrue on the effective date of the foregoing amendment for purposes of all time limits set forth in §610.

##### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### § 619. Severability of the Act

If any provision of this Act or the application thereof to any person, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications thereof.

##### HISTORY

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

## Chapter 11. Workers' Compensation

### SECTION

- 1001. Establishment of Program
- 1002. Definitions
- 1003. Acknowledgment of Program
- 1004. Insurance fund—Purpose; administration
- 1005. Rates
- 1006. Custodian; duties
- 1007. Payment of benefits
- 1008. Insurance Services Department—Powers and duties
- 1009. Benefit Review Board—Membership
- 1010. Hearings
- 1011. Decision final
- 1012. Annual report
- 1013. Compensation as exclusive remedy
- 1014. Choice of remedy as waiver of alternate remedy
- 1015. False statement or representation to obtain compensation; penalty and forfeiture
- 1016. Injury reports
- 1017. Report of accident
- 1018. Disclosure of preexisting disabilities
- 1019. Right to compensation and medical treatment benefits
- 1020. Time limit for reporting of claims
- 1021. Burden of proof
- 1022. Presumptions
- 1023. Acting under employer's directions
- 1024. Aggravation of preexisting disease or condition
- 1025. Going to and returning from work
- 1026. Occupational disease
- 1027. Compensation precluded by neglect or refusal of employee to submit to treatment
- 1028. Injury or death by consumption or application of drugs or chemicals
- 1029. Intoxication
- 1030. Acts of God; limitations
- 1031. Periodic medical examination of employee; effect of refusal or obstruction of examination or treatment
- 1032. Liability of third person to injured employee; subrogation powers
- 1033. Waiting period
- 1034. Total disability; definition and qualifying requirements; limitations

- 1035. Condition permanent, stationary and rateable; termination of benefits
- 1036. Notice by disabled employee of absence from locality
- 1037. Compensation for death
- 1038. Line of dependency; payment of benefits
- 1039. Apportionment of compensation
- 1040. Artificial members
- 1041. Replacement of artificial members
- 1042. Hernia
- 1043. Disfigurement benefits
- 1044. Vocational rehabilitation services
- 1045. Eyewear
- 1046. Clothing
- 1047. Travel to and from medical facility
- 1048. Compensation exempt from execution
- 1049. Benefits

### HISTORY

Note. All reference to "Workmen's Compensation" in this chapter have been changed to "Workers' Compensation". Previous references in this section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

### § 1001. Establishment of Program

There shall be a Workers' Compensation Program for all employees of the Navajo Nation, including all Enterprise employees, Council Delegates, Chapter officers, Grazing Committee members and others as set out in 15 NNC §1002 (G)(1) and (2).

### HISTORY

ACAU-94-78, §101, August 22, 1978.

### § 1002. Definitions

In this chapter, unless the context otherwise requires:

- A. "Adoption" shall include cases where persons are treated as adopted as well as those of legal adoption.
- B. "Award" means the findings or decision of the Review Board of the amount of compensation or benefits due an injured employee or the dependents of a deceased employee.
- C. "Child" includes dependent step-children, adopted children and acknowledged illegitimate children, but does not include married children unless they are dependents.
- D. "Claimant" means the injured covered member or dependents of same in the event of death of the covered employee.
- E. "Compensation" means the compensation and benefits provided by this chapter, i.e., "indemnity" means weekly disability payments, and



"medical" means medical expense, mileage and other expenses associated with medical treatment.

F. "Course and scope of employment" shall mean the time, place and circumstances under which the accident occurred. An injury must arise out of and be in the course and scope of employment in order that a claim be compensable.

G. "Covered member," "employee," "worker" means:

1. Every person in the service of the Navajo Nation elected, appointed or hired and carried on the payroll of the Navajo Nation, including all Enterprise employees, Council Delegates, Chapter officers, Grazing Committee members;

2. Volunteer fire fighters, in the course and scope of performing a service for the Navajo Nation as a volunteer fire fighter; this will apply only when the volunteer fire fighter is working under the direction and control of a recognized organization of the Navajo Nation; and,

3. Every person employed by an organization that is considered a member of this chapter by assessment of and payment for compensation benefit premiums.

4. Excluded as not in the employ of the Navajo Nation are consultants, independent contractors and all other persons not considered to be directly employed by the Navajo Nation unless a contractual agreement between the Navajo Nation and a non-related entity provides for workers' compensation. In that event, the contract shall be specific as to who, when, where and why this coverage is provided by the Navajo Nation; this will apply only when the non-related entity and covered members have agreed to all terms, conditions and provisions of this chapter.

5. The final determination as to the employment status of an individual shall be made by the Review Board.

H. "Death" is any fatality of the employee from work injury or occupational disease.

I. "Dependents" are the following persons, and they only shall be deemed dependents under the provisions of this chapter:

1. The widow/widower, if living with the deceased at the time of his or her death or legally entitled to be supported by him or her as a dependent;

2. A child under 18 years of age, or incapable of self-support, unmarried and dependent upon the deceased;

3. A parent or grandparent; if actually dependent upon the deceased;

4. A grandchild, brother or sister, only if under 18 years of age, or incapable of self-support and dependent upon the deceased;

5. A person is considered to be dependent upon the employee when requiring more than 50 percent contribution from the employee toward his or her support. The relation of dependency must exist at the time of the injury.

J. "Intoxication" means blood alcohol content in excess of .10 percent or conviction of the offense of driving while intoxicated or words to that effect, by any lawful jurisdiction.

K. "Minor employee" shall mean a minor working at an age and at an occupation legally permitted. Such minor shall be deemed of the age of majority for the purpose of this chapter. No other person shall have any claim or right to compensation for an injury to a minor employee, but an award of a lump sum of compensation to the minor employee shall be paid only to his or her legally appointed guardian.

L. "Parent or grandparent" means the natural father or mother or the natural grandfather or grandmother of the deceased employee.

M. "Review board" means the Workers' Compensation Employee Benefit Review Board of the Navajo Nation, formerly known as the Disability Board.

N. "Settlement" means the date the release of all claims is executed and the monetary terms of the agreement are met.

O. "Week" means seven calendar days, 30 calendar days equals one month.

#### HISTORY

ACAU-94-78, §113, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous subsection (13) or (M) pertaining to the use of masculine pronouns throughout this chapter has been deleted. Previous references in this section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

#### § 1003. Acknowledgment of Program

A. All covered members shall be conclusively presumed to have elected to take workers' compensation in accordance with the terms, conditions and provisions to include the schedule of benefits of this Program by virtue of membership in the Program; to include acknowledgment that the Navajo Nation is, in fact, a sovereign Nation for the purposes of workers' compensation, governed by the laws as set forth by the Navajo Nation Council and that no other state compensation law is applicable to injuries sustained by the covered members.

B. The Personnel Services Department of the Navajo Nation or the management of the Enterprises and member organizations hiring employees, shall be responsible for explaining the provisions of this Program to the employees and shall post in a conspicuous location a notice as follows:

## NOTICE TO EMPLOYEES

*All employees are hereby notified that the Navajo Nation is a sovereign Nation for the purposes of workers' compensation, governed by the laws as set forth by the Navajo Nation Council and that no other state compensation law is applicable to injuries sustained by an injured employee. If you do not fully understand the terms, conditions, provisions and schedule of benefits of the Navajo Nation Workers' Compensation Program, contact your supervisor for further details.*

## HISTORY

ACAU-94-78, §102, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous reference in this section to the "Comprehensive Employment and Training Act" ("CETA") have been deleted.

**§ 1004. Insurance fund—Purpose; administration**

A. There shall be a fund maintained for the purpose of payment for compensation claims and associated expenses as provided herein.

B. The fund shall be part of the Workers' Compensation Fund account maintained on the records of the Financial Services Department.

C. The funds shall be obtained by assessment of a percentage of that amount recovered for employee benefits, in conjunction with the Financial Services Department, Window Rock, Arizona, and/or by assessment charges to the various Enterprises and departments based on a specified rate adjusted annually at the beginning of each fiscal year based on the experience of the previous fiscal year. Collection shall be made by the Financial Services Department.

D. Failure of a participating organization to pay the assessed amount within 60 days from the date of billing shall subject that organization to possible suspension from this Program, as deemed appropriate by the Review Board. Failure of a member organization to pay its share shall not affect the rates of other member organizations in good standing.

## HISTORY

ACAU-94-78, §104, August 22, 1978.

**§ 1005. Rates**

A. The rates charged shall be at the direction of the Workers' Compensation Employee Benefit Review Board, adjusted in accordance with the loss experience of each contributor on an annual basis. Payment of death claims or the equivalent shall not be charged directly against any one contributor but shall be distributed to all contributors; i.e., pooled to prevent excessive rates to any one contributor. Adjusted rates shall

become effective at the beginning of the succeeding fiscal year following the announced adjustments.

B. The Review Board, in fixing rates, shall provide for an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, and other necessary reserves and surplus determined by the Review Board. The amount of surplus and reserves shall not be less than \$500,000.

C. The Review Board may, in its discretion, apply tentative rates subject to modification in accordance with the loss experience of each Enterprise or department.

D. An Enterprise or other member organization which misrepresents to the Review Board the amount of payroll upon which the premium to be paid to the insurance fund is based is liable to a penalty of 10 times the amount of the difference in premium paid and the amount the Enterprise or organization should have paid. The penalty shall be assessed by the Review Board and collected by the Financial Services Department at Window Rock, Arizona, and placed into the insurance fund. An organization assessed such a penalty shall have the right of appeal as in the case of a claimant, under 15 NNC §1011. Once a penalty is found just and payable, payment shall be made within 30 days thereafter or benefits for members of that organization shall be suspended until payment is made.

## HISTORY

ACAU-94-78, §105, August 22, 1978.

**§ 1006. Custodian; duties**

A. The Financial Services Department shall be custodian of the insurance fund; and all authorized disbursements therefrom shall be paid by the Financial Services Department, upon presentation of vouchers submitted and authorized by the Navajo Nation Insurance Services Department Risk Manager or his or her representative within its stated authority.

B. Internal control procedures will be established by the Financial Services Department.

C. The fund shall be subject to an annual audit or more frequently, if requested by the President of the Navajo Nation.

## HISTORY

ACAU-94-78, §106, August 22, 1978.

## CROSS REFERENCES

The Budget and Finance Committee of the Navajo Nation Council is authorized to require reports from and to monitor the financial performance of all offices, divisions, departments, enterprises, authorities, committees, boards, commissions

or entities having oversight or control over fiscal matters or financial obligations to the Navajo Nation. See 2 NNC §374(B)(8).

#### § 1007. Payment of benefits

The Insurance Services Department shall administer this chapter in accordance with the terms and conditions as described herein, and submit properly approved vouchers for payment to the Financial Services Department for all manner of compensation claims as provided for in the schedule of benefits. Contested claims shall be referred to the Review Board, which shall conduct hearings as the need may arise.

##### HISTORY

ACAU-94-78, §107, August 22, 1978.

#### § 1008. Insurance Services Department—Powers and duties

A. The Insurance Services Department shall be empowered to request medical reports, police reports, autopsy reports and special investigations, engage the services of adjusters and consultants, and perform other activities as required to process any claim for benefits or to further the intent of this chapter. Payments for expenses associated with this Activity will be made at the direction of the Navajo Nation Insurance Services Department's Risk Manager from the Workers' Compensation Fund, by submitting vouchers to the Financial Services Department for payment upon approval by the Financial Services Department.

B. Payment of claims shall be made at the direction of the Risk Manager of the Navajo Nation Insurance Services Department or his or her authorized representative within the Workers' Compensation branch.

C. Complete and accurate administrative records and claim files shall be maintained on all activities relating to the Workers' Compensation Program. All closed files shall be preserved for not less than six years.

D. The Insurance Services Department shall provide administrative support to the Review Board, make recommendations, and provide other assistance as deemed appropriate.

##### HISTORY

ACAU-94-78, §108, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

#### § 1009. Benefit Review Board—Membership

A. There shall be a Workers' Compensation Employee Benefit Review Board for the Navajo Nation. The Review Board shall be composed of a minimum of five regular members, one of which shall serve as chairperson of the Review Board and two alternate members. The

Review Board chairperson and members shall be appointed by the President of the Navajo Nation.

B. The President of the Navajo Nation may remove any member of the Review Board for cause.

##### HISTORY

ACAU-94-78, §109, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

#### § 1010. Hearings

A. Any member of the Review Board having a personal interest in the subject matter presented before the Board shall immediately disqualify himself or herself for cause and a previously appointed alternate member shall serve.

B. The employee shall have the right to challenge for cause any member of the Review Board and in that event, a previously appointed member or members shall serve.

C. The employee shall have the right to be represented by an attorney in all matters presented before the Review Board, to cross-examine all witnesses and to review all evidence of any nature, as may relate to the matter under consideration.

D. The Review Board shall have the right to cross-examine the employee claimant and all witnesses and to perform such discovery activity as may be deemed necessary to fully explore all aspects surrounding the occurrence and injury.

E. The Review Board shall not be bound by the rules of evidence or by technical or formal rules of procedure and may conduct investigations in such a manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out the spirit of this chapter.

F. A full and complete record shall be kept of all proceedings held before the Review Board of an investigation and testimony, by a recording device or by a stenographer.

G. The Review Board shall convene as necessary; but in no event will an employee be deprived of a hearing for more than 30 days from date of notice to the Review Board of his or her request for a hearing; provided:

1. That the issue is to determine whether the claim is compensable or non-compensable;
2. That the employee's condition is stationary for rating and award purposes, i.e., he or she is not under treatment, and the necessary factual information has been obtained, making a decision of the Board possible;

3. That the issue relates to the permanent and stationary condition of the claimant, (15 NNC §1035).

H. A claimant may request an evaluation for award purposes while remaining under medical treatment, with the approval of the Review Board.

I. Any award agreed to by the claimant for benefits under this chapter shall constitute a full and final settlement and all benefits shall cease upon settlement, except where the award provides for other than a lump sum settlement. If other than a lump sum settlement, the terms of the award agreement shall apply.

J. All parties shall have the right to continue the hearing after it has first convened for the purpose of further developing evidence.

**HISTORY**

ACAU-94-78, §110, August 22, 1978.

**§ 1011. Decision final**

A. The decision of the Review Board shall be by majority vote of no less than three members and a quorum shall consist of no less than five members.

B. The decision of the Review Board shall be final, with the right of appeal resting with the Supreme Court of the Navajo Nation. No court of the Navajo Nation, except the Supreme Court of the Navajo Nation, on appeal, shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend or annul any decision of the Review Board.

**HISTORY**

ACAU-94-78, §111, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

**§ 1012. Annual report**

A. The Review Board shall annually, on or before September 30, make a report to the President of the Navajo Nation for the preceding fiscal year. The report shall include:

1. A statement of the number of awards made;
2. A general statement of the causes of accidents for which the awards were made;
3. A detailed statement of disbursements from the insurance fund; and
4. Other matters which the Board deems proper to call to the attention of the President of the Navajo Nation, including recommendations.

B. The Insurance Services Department shall provide each organization which is a member of the Workers' Compensation Program a quarterly "Experience Report" providing information as to employees

injured, amounts paid for indemnity and medical, and an annual explanation of the rate-setting formula.

**HISTORY**

ACAU-94-78, §112, August 22, 1978.

**§ 1013. Compensation as exclusive remedy**

The right to receive compensation pursuant to the provisions of this chapter for injuries sustained by a covered member shall be the exclusive remedy against the Navajo Nation and employees thereof, except where the injury is caused by the fellow employee's willful misconduct and the act causing the injury indicates a willful disregard of life, limb or bodily safety of the insured employee, in which event, the injured employee may, at his or her option, either claim compensation or maintain an action at law for damage against the fellow employee or employees before the Navajo Nation Courts.

**HISTORY**

ACAU-94-78, §114, August 22, 1978.

**§ 1014. Choice of remedy as waiver of alternate remedy**

A. An employee, or his or her legal representative in the event death results, who accepts compensation, waives the right to exercise any option to institute proceedings in court against an employee of the Navajo Nation.

B. An employee, or his or her legal representative in the event of death, who exercises any option to institute proceedings in court against an employee of the Navajo Nation as provided for in 15 NNC §1013, waives any right to compensation.

**HISTORY**

ACAU-94-78, §115, August 22, 1978.

**§ 1015. False statement or representation to obtain compensation; penalty and forfeiture**

If, in order to obtain any compensation, benefit or payment under the provisions of this chapter, any person willfully makes a false statement or representation, such person shall forfeit all rights to such compensation, benefit or payment upon proof that the offense was committed, as ruled by the Review Board, subject to the appeal provisions stated in 15 NNC §1011.

**HISTORY**

ACAU-94-78, §116, August 22, 1978.

**§ 1016. Injury reports**

A. Information obtained by the attending physician or surgeon while in attendance of the injured person shall not be a privileged communication if such information is required by the Navajo Nation for a proper understanding of the case and a determination of the rights involved.

B. The Navajo Nation shall have the right to request a full and complete report from the physician or surgeon at times and in the form and details as deemed necessary and to present specific questions required to evaluate the claim.

C. The covered person acknowledges the right of the Navajo Nation to obtain such information by the covered person's acceptance of the Workers' Compensation Program of the Navajo Nation.

**HISTORY**

ACAU-94-78, §117, August 22, 1978.

**§ 1017. Report of accident**

A. When an accident occurs to an employee, the employee shall immediately, or as soon as possible thereafter, report the accident and the injury resulting therefrom to his or her immediate supervisor, who in turn shall report to his or her department or organization, as appropriate.

B. All accidents resulting in injury or death must be reported to the Navajo Nation Insurance Services Department within five working days of the date of occurrence by the responsible department or organization.

**HISTORY**

ACAU-94-78, §118, August 22, 1978.

**CROSS REFERENCES**

See ACAU-94-78, Exhibit "A", August 22, 1978 regarding Notice to employees.

**§ 1018. Disclosure of preexisting disabilities**

A. All employees of the Navajo Nation, its enterprises, divisions, departments and other covered organizations, shall disclose any preexisting physical or mental disorder or disability at time of hire and before commencing employment or before becoming a covered person under this chapter, as provided herein.

B. Any claim for aggravation of a preexisting condition which was not disclosed may be declined by the Review Board under this chapter if that person had knowledge of the preexisting condition and intentionally failed to disclose the preexisting condition on the employment application.

**HISTORY**

ACAU-94-78, §103, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

**§ 1019. Right to compensation and medical treatment benefits**

A. Every covered person coming within the provisions of this chapter who is injured, and the dependents of every such covered person who is killed by accident arising out of and in the course of his or her employment, wherever the injury occurred, unless the injury was purposely self-inflicted or otherwise limited or excluded by the terms and conditions of this chapter, shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of the injury or death or occupational disease, such benefits as are provided under this chapter including the provisions of 15 NNC §1049 hereof; the current Schedule of Benefits approved and certified by the Government Services and Budget and Finance Committees of the Navajo Nation Council pursuant thereto; and such medical and related expenses incurred thereby, as provided in subsection (B) of this section.

B. This program shall pay for treatment by a person licensed to practice medicine by any state within the United States, or foreign country if the injury occurs outside of the United States, including prescribed medication, care provided by a hospital or other accredited medical facility, surgical treatment and treatment by licensed chiropractors and other recognized, properly licensed or certified medically related practitioners recognized by the Navajo Nation, reasonably required at the time of the injury, and during the period of disability attributable thereto, to the extent such expenses are not covered by any other valid and collectible insurance or other benefit program to which the employee is otherwise entitled. In no event shall the program be liable for expenses or reimbursement for medical, surgical, hospital or related benefits to which the injured person may be entitled to receive from or through the United States Public Health Service or any federally funded or sponsored Indian Health Service programs; nor in any event shall the Workers' Compensation Program of the Navajo Nation be considered or understood to be an "alternative source" for payment of the expense of such services.

**HISTORY**

CF-2-82, February 3, 1982.

ACAU-94-78, §119, August 22, 1978.

Note. Slightly reworded for purposes of statutory form. Previous reference to the "Advisory Committee of the Navajo Tribal Council" has been changed to the "Government Services and Budget and Finance Committees of the Navajo Nation Council" pursuant to CD-68-89, Resolved Clause 10, 2 NNC §§343(B)(4),

374(B)(4) and (8), and 933(A). See also the powers and purposes of the Human Services Committee of the Navajo Nation Council at 2 NNC §601 *et seq.*

#### § 1020. Time limit for reporting of claims

A. Claims for injury shall be made within one year from the date of occurrence.

B. Claims for occupational disease shall be made within one year from date of first notice by a physician; but in no event, longer than three years from the date employee terminates his or her employment with the Navajo Nation.

##### HISTORY

ACAU-94-78, §143, August 22, 1978.

#### § 1021. Burden of proof

A. The burden of proof, except as set forth in 15 NNC §1022, shall rest upon the covered person, or his or her dependents in the case of death, to prove:

1. That the injury complained of was a result of an accident or occupational disease;
2. That it arose out of his or her employment; and
3. That it arose while in the course of his or her employment.

##### HISTORY

ACAU-94-78, §120, August 22, 1978.

#### § 1022. Presumptions

When a covered person is found dead by accident under circumstances indicating that the accident took place within time and place limits of employment and no conclusive evidence is present to exclude coverage as provided herein, it shall be the presumption that death arose out of employment and benefits shall be paid.

##### HISTORY

ACAU-94-78, §121, August 22, 1978.

#### § 1023. Acting under employer's directions

Any covered person who is injured or killed while following the directions of his or her employer or his or her employer's agent shall be considered to have been in the course and scope of his or her employment and shall be entitled to compensation benefits.

##### HISTORY

ACAU-94-78, §122, August 22, 1978.

#### § 1024. Aggravation of preexisting disease or condition

If an injured person is suffering from a disease or injury at the time the accident occurs and the disease or injury is aggravated thereby, the disease or injury is compensable for payment of medical and indemnity. For the purpose of settlement for permanent partial or permanent total disability, the amount of the award for that disability as set forth in the schedule of benefits may be reduced or denied in its entirety by the Review Board in consideration of the following:

A. A prior settlement from any source for the same disability;

B. A preexisting physical disability, that disability being to a lesser degree than the disability currently claimed; payment for the extension of the original disability which resulted from the covered person's employment applicable under this chapter, i.e., the difference between the degree of disability of the employee before the covered accident or occupational disease and the degree of disability after the covered accident or occupational disease.

##### HISTORY

ACAU-94-78, §123, August 22, 1978.

#### § 1025. Going to and returning from work

An accident occurring to an employee while on the way to or from work is not within due course of his or her employment unless such traveling is in connection with his or her work from the time his or her travel starts either at his or her place of work or his or her home. This will not apply if the employee deviates from a reasonably direct route of travel, not in the interest of the employer, or during, other activities within the travel, not necessitated by the employment activity and not in the interest of the employer.

##### HISTORY

ACAU-94-78, §124, August 22, 1978.

#### § 1026. Occupational disease

A. Occupational disease is one that arises out of a particular trade or occupation from a particular industrial process. It is a disease to which a broker is not ordinarily subject or exposed to outside or away from his or her employment.

B. It is the intent of this chapter to provide benefits for those employees who incur disability or death as a result of occupational disease such as, but not limited to, silicosis, chronic lead poisoning, loss of hearing, etc.

##### HISTORY

ACAU-94-78, §125, August 22, 1978.

**§ 1027. Compensation precluded by neglect or refusal of employee to submit to treatment**

No compensation shall be payable for the death or disability of an employee if his or her death is caused by, or insofar as his or her disability may be aggravated, caused or continued by, an unreasonable refusal or neglect to submit to or follow any competent or reasonable surgical treatment or medical aid.

**HISTORY**

ACAU-94-78, §126, August 22, 1978.

**§ 1028. Injury or death by consumption or application of drugs or chemicals**

No benefits of any nature shall be payable for injury and/or death caused or contributed to by any drug, (except those drugs prescribed by a physician), including narcotics and hallucinogens, or any gas or fumes, taken or inhaled voluntarily, or by voluntary poisoning.

**HISTORY**

ACAU-94-78, §144, August 22, 1978.  
Note. Parentheses added for clarity.

**§ 1029. Intoxication**

Benefits shall not be payable for any covered person injured or killed while intoxicated as defined in 15 NNC §1002, regardless of whether or not the intoxicated condition was the proximate cause of the injury or death, i.e., it is necessary only to prove that the covered person was intoxicated at the time of the accident to deny benefits under this chapter.

**HISTORY**

ACAU-94-78, §149, August 22, 1978.

**§ 1030. Acts of God; limitations**

Injury or death deemed an "Act of God" shall be considered compensable provided other qualifying conditions are met, except injury or death which results from a natural cause, i.e., heart attack, stroke or other natural body function failure, not arising out of the employment.

**HISTORY**

ACAU-94-78, §148, August 22, 1978.

**§ 1031. Periodic medical examination of employee; effect of refusal or obstruction of examination or treatment**

A. An employee entitled to compensation shall submit himself or herself for medical examination from time to time at a place reasonably

convenient for the employee, if and when requested by the Insurance Services Department or the Review Board.

B. The request for the medical examination shall fix a time and place having regard to the convenience of the employee, his or her physical condition and ability to attend. The employee may have a physician present at the examination if procured and paid for by himself or herself.

C. If the employee refuses to submit to the medical examination or obstructs the examination, his or her right to compensation shall be suspended until the examination has been made, and no compensation shall be payable during or for such period.

D. Any physician who makes, or is present at, the medical examination provided by this section may be requested to testify as to the result thereof; and the cost of this appearance shall be at the expense of the Workers' Compensation Program.

E. The Review Board may reduce or suspend the compensation of an employee who persists in unsanitary or injurious practices tending to imperil or retard his or her recovery, or who refuses to submit to medical or surgical treatment reasonably necessary to promote his or her recovery.

**HISTORY**

ACAU-94-78, §127, August 22, 1978.

**§ 1032. Liability of third person to injured employee; subrogation powers**

A. If a covered person entitled to compensation under this chapter is injured or killed by the negligence or wrong doing of another not in the employ of the Navajo Nation, its Enterprises, divisions or other covered member organizations, such injured employee, or his or her dependents in the event of his or her death, may pursue his or her remedy against such other person while receiving benefits under this chapter.

B. If the employee entitled to compensation under this chapter or his or her dependents do not pursue his or her or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the Navajo Nation. Such a claim so assigned may be prosecuted or compromised by the Navajo Nation for benefits paid.

C. If employee proceeds against such other person, compensation, medical, surgical, hospital benefits and death benefits shall be paid as provided in this chapter and the Navajo Nation shall have a lien on the amount actually collectable from such other person to the extent of such compensation, medical, surgical, hospital benefits and death benefits

paid. Compromise of any claim by the covered person or his dependents at an amount less than the compensation, medical, surgical, hospital benefits and death benefit provided for shall be made only with written approval of the Review Board.

D. The Navajo Nation shall have the right of subrogation for the amount of payments made for indemnity or medical payments under this chapter, upon the completion of a settlement with the claimant.

E. Any person eligible for benefits under this chapter, who may be eligible for benefits under the uninsured motorists provisions of the Tribal Automobile Comprehensive Program, must elect to recover benefits from either this Workers' Compensation Program or the Tribal Automobile Comprehensive Program. In no event may a person receive benefits under both insurance programs.

**HISTORY**

ACAU-94-78, §128, August 22, 1978.

**§ 1033. Waiting period**

No indemnity benefits shall be allowed under the provisions of this chapter for any accidental injury which does not result in the workers' disability which lasts more than seven consecutive days. If the period of the workers' disability lasts for more than 28 consecutive days from the date of his or her accidental injury, indemnity benefits shall be allowed from the date of disability. An employee may not recover indemnity payments for the period of time that he or she is compensated by annual or sick leave, at the employee's option. Annual or sick leave time taken shall apply against the waiting period for indemnity payments. Compensation benefits for indemnity and medical payments shall not be payable for a period in excess of 520 weeks.

**HISTORY**

ACAU-94-78; §129, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

**§ 1034. Total disability; definition and qualifying requirements; limitations**

A. "Total disability" means complete incapacity to engage in an occupation as a result of an occupational injury or disease. Occupation means any vocation for which the employee is or becomes reasonably fitted by education, training or experience.

B. Independently of any other cause, the entire and irrecoverable loss of sight of both eyes, or the loss by actual severance through and above the wrist or ankle joint of both hands or feet, shall be considered total disability even if the employee shall engage in an occupation.

C. An award of total disability shall be in lieu of all lesser scheduled benefits that may be applicable to the injury that created the condition of total disability.

**HISTORY**

ACAU-94-78, §146, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

**§ 1035. Condition permanent, stationary and rateable; termination of benefits**

When an employee's physical condition reaches a point where no further medical treatment is deemed appropriate or useful to correct a disability as supported by a competent medical authority:

A. The employee's condition shall be considered permanent, stationary and rateable;

B. The employee shall be notified in writing that his or her condition is permanent, stationary and rateable and that all benefits, if being claimed at that time, shall cease 30 days from date of notice;

C. The employee shall be advised of the amount payable to him or her in accordance with the terms, conditions, provisions and schedule of benefits of this chapter;

D. The Insurance Services Department shall tender the amount payable to the employee within the 30-day termination period;

E. Failure of the employee to execute the required documents and to accept such payment shall constitute the employee's refusal to settle his or her claim; and

F. The employee may request a hearing before the Review Board as provided for in this chapter.

**HISTORY**

ACAU-94-78, §145, August 22, 1978.

**§ 1036. Notice by disabled employee of absence from locality**

No employee may leave the locality in which he or she is receiving treatment while the necessity of having medical treatment continues without written approval of the Review Board. Any employee leaving the locality in which he or she is receiving medical treatment without such approval may forfeit his or her right to compensation during such time, as well as his or her right to reimbursement for his or her medical expenses and any aggravation of his or her disability.

**HISTORY**

ACAU-94-78, §138, August 22, 1978.



**§ 1037. Compensation for death**

If an accidental injury sustained by a worker proximately results in his or her death within two years following his or her accidental injury, compensation shall be paid in the amount and to the persons entitled thereto, as follows:

A. If there are no eligible dependents, compensation shall be limited to the funeral expenses, not to exceed \$2,500, and the expenses provided for medical and hospital services for the deceased, together with all other sums which the deceased should have been paid for compensation benefits up to the time of his or her death, payable to the estate of the deceased; or

B. If there are eligible dependents at the time of the worker's death, payment shall consist of a lump sum as set forth in the schedule of benefits.

**HISTORY**

ACAU-94-78, §130, August 22, 1978.

Note. Slightly reworded for purposes of statutory form.

**§ 1038. Line of dependency; payment of benefits**

The line of dependency for payment of death benefits shall be in the order set out below, provided each qualifies as a dependent under the terms and conditions of this chapter:

A. First to the surviving spouse, if there are no children. If dependent children exist at time of employee's death, payment is to widow or widower, subject to the provisions of 15 NNC §1039;

B. If no surviving spouse, to the dependent single child, 100 percent of death benefit; or if more than one dependent child, to be divided among such dependent children, share and share alike;

C. To a parent or parents, if no surviving spouse or eligible children, if dependent upon the deceased employee, 100 percent of death benefit if only one parent; to be divided among both parents if both are dependent upon deceased employee, share and share alike; or

D. If there are no eligible dependent spouse, children or parents, the death benefit shall be divided among all other eligible dependents, share and share alike.

**HISTORY**

ACAU-94-78, §131, August 22, 1978.

**§ 1039. Apportionment of compensation**

Compensation to a dependent widow or widower shall be for the use and benefits of the widow or widower and the dependent children; and the Review Board may, upon proper application at time of award,

apportion the compensation between them in such a way as it deems best for the interest of all beneficiaries.

**HISTORY**

ACAU-94-78, §132, August 22, 1978.

**§ 1040. Artificial members**

In all cases where the injury is such as to permit the use of artificial members, including teeth and eyes, the Workers' Compensation Program shall pay all expenses connected with the artificial member.

**HISTORY**

ACAU-94-78, §133, August 22, 1978.

**§ 1041. Replacement of artificial members**

The Workers' Compensation Program shall, during the lifetime of the employee, replace or repair any artificial member or members, including dentures and artificial eyes, that were originally provided to the injured employee by the Program.

**HISTORY**

ACAU-94-78, §147, August 22, 1978.

**§ 1042. Hernia**

Employees, in order to be entitled to compensation for a hernia, must clearly prove:

A. That the hernia is of recent origin;

B. That this appearance was accompanied by pain;

C. That this was immediately preceded by some accidental strain suffered in the course of employment; and

D. That it did not exist prior to the date of the alleged injury. If a worker, after establishing his or her right to compensation for a hernia, as provided above, elects to be operated upon, the operating fee and reasonable hospital expenses shall be paid by the Workers' Compensation Program. In case such worker elects not to be operated upon and the hernia becomes strangulated in the future, the results from the strangulation shall not be compensated.

**HISTORY**

ACAU-94-78, §134, August 22, 1978.

**§ 1043. Disfigurement benefits**

For serious permanent disfigurement about the body, in addition to other compensation benefits that may be allowed under this chapter, an additional sum for compensation on account of the serious perma-

ment disfigurement, as the Review Board deems just, may be paid, not to exceed \$2,500.

**HISTORY**

ACAU-94-78, §135, August 22, 1978.

**§ 1044. Vocational rehabilitation services**

In addition to the medical and hospital services provided, the employee shall be entitled to such vocational rehabilitation services, including retraining or job placement, as may be necessary to restore him or her to suitable employment when he or she is unable to return to his or her former job. Such additional compensation shall not exceed \$3,000.

**HISTORY**

ACAU-94-78, §136, August 22, 1978.

**§ 1045. Eyewear**

The Workers' Compensation Program shall pay for frames and/or lenses of a like kind and quality as any damaged as a result of an accident which results in a compensable injury to the employee during the course and scope of his or her employment, but shall not pay for eye examinations unless there is a potential injury to the employee's eyes from the occurrence.

**HISTORY**

ACAU-94-78, §140, August 22, 1978.

**§ 1046. Clothing**

An employee who incurs damages to his or her clothing during an accident which results in a compensable injury shall be paid for replacement clothing of a like kind and quality.

**HISTORY**

ACAU-94-78, §141, August 22, 1978.

**§ 1047. Travel to and from a medical facility**

The injured employee shall be compensated for mileage to and from a medical facility at a rate consistent with the travel allowance authorized by the established Navajo Nation travel policy in effect at the time the travel was performed. The injured employee may be compensated for food and lodging while receiving medical treatment in excess of 100 miles from his or her home of record at a rate consistent with the per diem allowance authorized by the established Navajo Nation travel policy in effect at the time the expense was incurred.

**HISTORY**

ACAU-94-78, §142, August 22, 1978.

**§ 1048. Compensation exempt from execution**

Compensation shall be exempt from claims of creditors and from any attachment, garnishment or execution; and it shall be paid only to such worker or his or her personal representative or such other persons as the Review Board may, under the terms of this chapter, appoint to receive or collect the same.

**HISTORY**

ACAU-94-78, §137, August 22, 1978.

**§ 1049. Benefits**

A. A schedule of benefits shall be established by the Government Services and Budget and Finance Committees of the Navajo Nation Council, reviewed annually during the first session after commencement of the new fiscal year for adjustments as the need might appear, and shall become a part of this chapter upon date of certification.

B. If an injury or occupational disease has left the covered member with a permanent bodily impairment, compensation for a specified number of weeks is payable, in one lump sum, without regard to presence or absence of wage loss in the future. For loss or loss of use of body members, schedules of the number of weeks for which compensation is payable are provided.

C. For other nonscheduled permanent impairments, a calculation of percentage of total permanent disability is made. The award made pursuant to the schedule of benefits is the exclusive remedy. This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law as found in many states. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one instead of a specifically proven one based on the individual's actual wage loss experience. The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at the employee's earning record for some relatively short temporary period preceding the compensation award. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effect of the impairment on the employee's earnings each time the employee contends that his or her earnings are being adversely affected.

D. To avoid this protracted administrative task for which the Navajo Nation may lack trained personnel, the schedule of benefits approach has been devised.

E. For the purpose of this chapter, scheduled losses are recognized in three forms, presenting an ascending degree of difficulty: loss of a particular member; loss of use of a member; and unscheduled or more generalized impairments which are rated on the percentage of disability (loss of total body function) of the entire body, from the scheduled amount for permanent total disability.

F. A total loss of use of a member exists whenever, by reason of injury, such member no longer possesses any substantial utility as a member of the body.

G. The percentage of permanent partial disability, i.e., partial loss of use of the member or entire body, is arrived at by calculating the percentage that the proven disability bears to the total disability, i.e., total loss of use of the member or entire body.

H. The unit by which weekly indemnity payments are measured consists of 66 2/3 percent of the "average weekly wage". The computation of the average weekly wage is based upon gross actual wages during the preceding 90-day period. Average weekly wages shall mean the earnings of the injured employee in the employment in which he or she was working at the time of the injury during the period of 90 days immediately preceding the date of the injury; but where for exceptional reasons the foregoing would be unfair, either to the employee or the Navajo Nation, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. Maximum weekly indemnity payable is \$200. Disability benefits are measured by multiplying the gross average weekly wage times the number of weeks reflected in the schedule of benefits, or percentage thereof in a case of partial disability.

I. Schedule of benefits:

1. All persons earning less than \$125 per week shall be rated at a weekly wage of \$125, regardless of income, for the purpose of determining benefits under this chapter.

2. Maximum award for a single disability or combination of disabilities paid in accordance with the schedule of benefits is \$40,000.

3. SCHEDULE OF BENEFITS

a. ARM

- (1) Dextrous
  - (a) At or near shoulder ..... 60 weeks
  - (b) At elbow ..... 50 weeks
  - (c) Between elbow and wrist ..... 47 weeks
- (2) Nondextrous
  - (a) At or near shoulder ..... 53 weeks
  - (b) At elbow ..... 47 weeks
  - (c) Between elbow and wrist ..... 44 weeks

b. HAND

- (1) Dextrous..... 37 weeks
- (2) Nondextrous..... 33 weeks

c. THUMB

- (1) Total..... 17 weeks
- (2) At proximal joint ..... 10 weeks
- (3) At distal joint ..... 7 weeks

d. FIRST FINGER

- (1) Including metacarpal ..... 8 weeks
- (2) At proximal joint ..... 6 weeks
- (3) At second joint..... 5 weeks
- (4) At distal joint ..... 4 weeks

e. SECOND FINGER

- (1) Including metacarpal ..... 7 weeks
- (2) At proximal joint ..... 5 weeks
- (3) At second joint..... 4 weeks
- (4) At distal joint ..... 3 weeks

f. THIRD FINGER

- (1) Including metacarpal ..... 5 weeks
- (2) At proximal joint ..... 4 weeks
- (3) At second joint..... 3 weeks
- (4) At distal joint ..... 3 weeks

g. FOURTH FINGER

- (1) Including metacarpal ..... 5 weeks
- (2) At proximal joint ..... 4 weeks
- (3) At second joint..... 3 weeks
- (4) At distal joint ..... 3 weeks

h. ALL FINGERS-pertaining to one hand,

- except thumb ..... 19 weeks

- i. LEG
  - (1) At or near hip joint ..... 60 weeks
  - (2) At or above knee ..... 47 weeks
  - (3) Between knee and ankle ..... 40 weeks
- j. FOOT
  - (1) At ankle ..... 33 weeks
- k. GREAT TOE
  - (1) Including metatarsal ..... 12 weeks
  - (2) At proximal joint ..... 5 weeks
  - (3) At second joint ..... 3 weeks
- l. ONE TOE
  - (1) Including metatarsal ..... 4 weeks
  - (2) At proximal joint ..... 3 weeks
  - (3) At second joint ..... 3 weeks
- m. ALL TOES, same foot ..... 12 weeks
- n. EYE-ONE
  - (1) Total Blindness ..... 37 weeks
- o. EYE-BOTH  
See Total Disability
- p. EAR
  - (1) Total deafness, one ear ..... 12 weeks
  - (2) Total deafness, both ears ..... 45 weeks
- q. LOSS OF LIFE ..... 125 weeks
- r. TOTAL DISABILITY ..... 125 weeks

J. Other benefits

1. Mileage (see 15 NNC §1047). Mileage from resident address of employee to the medical facility and return, based on mileage shown on official state maps as issued by the states involved, plus reasonable local mileage, not to exceed 20 miles per trip, upon presentation of a statement by the employee and signed by the employee, showing date or dates and points traveled. The rate shall be equal to the prevailing rate payable to Navajo Nation employees for similar travel.

2. Meals and lodging (see 15 NNC §1047). For employee only, unless his or her condition warrants a relative or other person to assist; payment for this additional person shall be at the discretion of the Insurance Services Department. The allowable expense shall be equal to the prevailing amount payable to Navajo Nation employees, for similar expense. For lodging, maximum per person, \$17.50, unless a special circumstance would create a higher cost, an increase above the maximum is allowable at the discretion of the Insurance Services Department.

3. Land or air ambulance charges (for injured employees only) shall be recognized and payable under this chapter. Expenses for the return of an employee injured away from his or her place of employment, except by ambulance, are not reimbursable under this chapter, i.e., if an employee was sent to some distant locality by his or her organization, is injured, treated and released, that employee is considered to be in the charge of his or her organization for the return travel expense.

4. All claims for reimbursement must be supported by valid receipts showing the date and place of services, meals, lodging, etc., to be reimbursable.

HISTORY

ACAU-94-78, §150, August 22, 1978.

Note. Regarding Government Services and Budget and Finance Committees, see note under §1019.

## Chapter 13. Crownpoint Institute of Technology

### SECTION

- 1201. Establishment; name; place; duration
- 1202. Status
- 1203. Purposes and powers
- 1204. Board of Directors
- 1205. Powers and duties of the Board of Directors
- 1206. Officers
- 1207. Board meetings
- 1208. Dissolution
- 1209. Amendments

### § 1201. Establishment; name; place; duration

A. There is established by the Navajo Nation Council of the Navajo Nation, a corporation to be known as Crownpoint Institute of Technology.

B. The principal place of business of the Corporation shall be at Crownpoint, New Mexico, but it may establish such other places of business, consistent with these Articles, as the Board may determine.

C. The duration of the Corporation shall be perpetual.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

Crownpoint Institute of Technology, Inc., was formerly known as "Navajo Skill Center."

### § 1202. Status

A. This Corporation is organized as a non-profit, nonmembership corporation, wholly owned by the Navajo Nation, and organized exclusively for educational, charitable and governmental purposes.

B. The Corporation is a non-profit vocational technical educational institution of the Navajo Nation government, and is to be considered part of the "Navajo Nation" for purposes of the Navajo Sovereign Immunity Act, 1 NNC §551 *et seq.*

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

### § 1203. Purposes and powers

A. The Corporation is organized for the primary purpose of providing programs of post-secondary vocational education and college academic programs to qualified persons, in appropriate fields, including on-the-job training, and to conduct other socially beneficial programs to promote health care, adult education, and social welfare, and any other activities intended to alleviate poverty or lessen the burdens of government, and to do all things appropriate to the furtherance of these purposes, including the construction and operation of buildings and other physical facilities for the carrying out of its programs.

B. The Corporation is further organized for the purposes of securing funds from public and private sources for support and maintenance of its educational programs, and all related purposes, and developing and implementing programs and all related purposes, and developing and implementing programs and activities not inconsistent with its status as an educational institution of the Navajo Nation, its purposes as stated in these Articles, or with the allowable activities of organizations qualified as charitable or educational within the meaning of §501(c)(3) or any successor section of the Internal Revenue Code, that generate income to the Corporation in the course of providing vocational education and training to students.

C. In furtherance of these purposes, and consistent with these Articles and other applicable law, the Corporation shall have the power to receive and administer funds, take and hold by bequest, devise, gift, grant, purchase or otherwise, either solely or jointly with another, any property, real, personal or otherwise or any interest therein, without limitation as to amount or value; to sell, convey or otherwise dispose of such property, and to invest, reinvest or deal with the principal and income thereof in such manner as, in the judgment of the Board, will best promote and serve the interests of the Corporation; to enter into contracts and to incur debts and liabilities up to the amount of the Corporation's assets; to sue and be sued, subject to and in conformity with the provisions of the Navajo Sovereign Immunity Act, 1 NNC §551 *et seq.*, and provided that the Corporation shall have no power to waive the sovereign immunity of the Navajo Nation; and to do any and all other acts or things, within or without the Navajo Nation, appropriate or convenient to achieve the purposes for which it is organized or for any other lawful purposes not inconsistent therewith, and not in contravention of any applicable law.

D. No substantial part of the activities of the Corporation shall consist of disseminating any political propaganda or attempting to influence legislation, nor shall the Corporation participate or intervene in any political campaign on behalf of any candidate for public office.

E. No part of the income of the Corporation shall inure to the benefit of any director or officer of the Corporation, or of any private person, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to reimburse expenses incurred in the course of such services, and to make payments and distributions in furtherance of its purposes and above-described.

F. Notwithstanding any other provision hereof, the Corporation shall have no power to engage in any activity prohibited to organizations described in §501(c)(3) of the Internal Revenue Code or its successor, except that so long as the Corporation is determined to be a political subdivision of the Navajo Nation within the meaning of 26 U.S.C §7871, it shall have the power to do any acts or things permitted of such political subdivisions.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

#### § 1204. Board of Directors

A. The general affairs of the Corporation shall be managed and its policies established by a Board of Directors composed of five (5) members. Board members should have some prior experience in or familiarity with the fields of education, business, industry, government or labor.

B. Persons shall be nominated to fill vacancies on the Board by the President of the Navajo Nation and the names submitted to the Government Services Committee of the Navajo Nation Council, which must confirm the nominees by majority vote.

C. Board members shall serve terms of three (3) years each, and terms shall be staggered so that approximately one-third of the seats on the Board become vacant each year. A Board member shall continue to serve after the formal expiration of the term until a successor has been confirmed by the Government Services Committee.

D. Should a Board member resign before the expiration of his or her term, the President of the Navajo Nation shall nominate a successor to complete the term, subject to confirmation by the Government Services Committee.

E. No action of the Board shall be of any validity unless taken at a duly called meeting of the Board at which a quorum is present, or unless subsequently ratified by a majority vote at such a meeting. No individ-

ual Board member shall have the authority to act for or bind the Board unless the Board has expressly authorized such action in advance.

F. At its first regular meeting following the confirmation of new members each year, the Board shall elect officers consisting of a chairperson, a vice-chairperson, and a secretary. The chairperson shall call and conduct meetings, and prepare the agenda in consultation with the president of the Corporation, and shall execute all official documents on behalf of the Board as the Board directs. The vice-chairperson shall act in the place of the chairperson in the event of the latter's absence or disability. The secretary shall maintain the records of the Board. The Board may from time to time delegate additional duties to its officers. Officers of the Board shall serve until their successors are elected.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

#### § 1205. Powers and duties of the Board of Directors

In its management of the Corporation, the Board shall have the following powers and duties:

A. To report no less than once a year to the Education Committee of the Navajo Nation Council on the operation of the Corporation and at such other times as the Committee determines on matters of concern to the Committee;

B. To review and approve the annual budget of the Corporation and all requests and proposals for funding, whether by contract, grant or otherwise;

C. To establish, and review and revise from time to time as appropriate, the program priorities of the Corporation and to insure that budget and funding proposals are consistent therewith; and are covered by adequate insurance at all times;

D. To review and approve training curricula and program plans, in accordance with established program priorities of the Corporation;

E. To insure that the Corporation takes all necessary steps to maintain full accreditation of its instructional programs by recognized accreditation agencies;

F. To issue appropriate certificates and diplomas to students who satisfactorily complete their training programs and/or studies, of the Corporation and to confer appropriate certificates and degrees. Such certificates shall be executed by the chairperson of the Board;

G. To review and approve all administrative and instructional policies and procedures, and all publications issued to employees or students setting forth such policies and procedures, and to insure that such publications, and the policies and procedures contained therein, are periodically reviewed and updated;

H. To review and approve monthly reports from the various administrative branches of the Corporation, including financial reports, and generally to insure that administrative matters are being handled efficiently and professionally;

I. To establish and periodically review Corporation policies pertaining to student tuition and fees, and changes, (if any) to be more to outside organizations for use of Corporation facilities;

J. To insure that the Corporation remains in compliance with all applicable federal and Navajo Nation laws and regulations, including but not limited to health and safety standards;

K. To establish and periodically review standards and qualifications for admission of students to educational and training programs operated by the Corporation;

L. To insure that approved Corporation policies and procedures are being enforced appropriately by the administrative staff, and, in accordance with those policies and procedures, to sit as the ultimate reviewing body with respect to employee grievances;

M. Subject to the availability of funds, to insure that the Corporation's facilities are kept in good and usable condition, are properly maintained and secured, and are covered by adequate insurance at all times;

N. To insure that all training and other activities conducted by the Corporation pursuant to a grant or contract with another public or private agency are carried out in full compliance with the terms of the grant or contract documents and with any applicable laws or regulations;

O. To select and hire the President of the Corporation, and such other executive officers as the Board may determine, and fix their salaries, and to oversee their activities and, where necessary, take appropriate disciplinary measures against such officers up to and including removal;

P. To establish and periodically review an appropriate salary and job classification schedule for employees of the Corporation;

Q. To review and approve all contracts for personal services to be entered into by the Corporation, and for purchases or sales of equipment in excess of \$100,000.00, provided, that the Board may require that procurement contracts for lesser amounts be submitted to it for approval in particular circumstances;

R. To review and approve transactions to be entered into by the Corporation affecting any interest in real property;

S. To accept (or reject) any gift, grant, bequest or devise to or on behalf of the Corporation;

T. To establish and review periodically, and to ensure compliance with policies governing financial accounting for the Corporation, and to provide for a full and independent audit of the Corporation's finances at least annually;

U. To defend litigation initiated against the Corporation or against any director, officer or employee thereof for an act committed in the course of his or her official duties; and

V. As appropriate, and in accordance with specific guidelines, to delegate the execution of any of the foregoing duties and powers to the President or other appropriate administrative officers of the Corporation, or to consultants engaged for that purpose; provided that the Board shall remain ultimately responsible for all matters set forth in this article.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

#### CROSS REFERENCES

Education Committee of the Navajo Nation Council, 2 NNC §484(B)(4).

#### § 1206. Officers

A. The day-to-day administration of the affairs of the Corporation shall be vested in a President, who shall be hired by the Board. The President shall be responsible for all aspects of the Corporation's operation, including administrative, personnel, fiscal, plant operation and maintenance, training, monitoring, funding, planning, development, student services, security, counseling, and other such activities, and shall have such other duties as the Board may delegate from time to time. The President shall plan and attend all meetings of the Board, develop the agenda therefor in conjunction with the Board chairperson, and shall report to the Board on all matters of Corporation business requiring the Board's attention. The President shall see to the execution and implementation of all actions and policies of the Board, and with the Board chairperson shall represent the Corporation in dealings with funding agencies and other public and private entities. The President shall also exercise all powers of the Corporation not specifically dele-

gated to the Board by these Articles, and such other powers as the Board may delegate to him or her.

B. The Corporation may have such other officers as the Board shall determine.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

#### § 1207. Board meetings

A. The Board shall meet monthly, at a place and time to be determined at the previous meeting. Special meetings of the Board shall be called at the request of the Chairperson, or on the written request of at least two (2) members of the Board, delivered to the Board's secretary. Unless otherwise determined by the Board, such meetings shall be open to interested persons, provided, that all official action of the Board shall be taken in open meetings. Each Board member shall receive written notice of any meeting of the Board.

B. No official business shall be conducted at any meeting of the Board at which a quorum is not present. A quorum shall consist of three (3) members.

C. The Board shall determine its own rules for the conduct of business. Votes may be taken by voice vote or show of hands, but on the request of any member a roll call vote shall be taken on any official action.

D. The Board shall insure that minutes of all meetings are taken and are kept on file at the offices of the Corporation.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

#### § 1208. Dissolution

In the event the Corporation is dissolved, all of its property and other assets shall revert to the Navajo Nation government, and shall be used for charitable, educational, or other governmental purposes of the Navajo Nation.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

#### § 1209. Amendments

These Articles may be amended by a two-thirds vote of the Board, at the meeting following the meeting at which the amendment is proposed, subject to the concurrence of the Education and Government Services Committees of the Navajo Nation Council.

#### HISTORY

CJY-68-95, July 21, 1995.

ACMY-100-88, May 10, 1988.

ACJA-7-87, January 2, 1987.

ACN-147-81, November 18, 1981.

Note. Slightly reworded for purposes of statutory form.

#### CROSS REFERENCES

Education Committee of the Navajo Nation Council, 2 NNC §484(b)(4).

Government Services Committee of the Navajo Nation Council, 2 NNC §343.

See CD-68-89, Resolved Clause 10.



**CHAPTER 53**  
**STOCKBRIDGE-MUNSEE TRIBAL LAW**  
**EMPLOYEE RIGHTS ORDINANCE**

**Preamble**

The Stockbridge-Munsee Tribe is firmly committed to the principal of tribal self-government. Consistent with federal policy, tribal government provides a wide range of public services, including general governmental services, the maintenance of peace and good order, and the promotion and regulation of economic activities within the sovereign jurisdiction of the tribe. Pursuant to the inherent sovereign powers of the Tribe and the powers expressly delegated to the Tribal Council by the tribal constitution, the tribal government recognizes the need for creating laws to govern and protect its employees, especially where state and federal laws do not apply.

**Section 53.1 Purpose**

The Stockbridge-Munsee Tribal Council recognizes that on occasion, differences may arise between employees and supervisors due to misunderstanding, lack of communication, or concern over supervisory decisions. The Stockbridge-Munsee Tribal Council further recognizes that employees of the Mohican Nation, comprised of all branches of government and business, need protection of their rights including a stable working environment and the right to file a grievance and seek assistance in solving on-the-job problems via the proper, established policies and procedures. The Stockbridge-Munsee Tribe, through this ordinance, seeks to define and establish employees rights and to establish a grievance process allowing all tribal employees an opportunity to have recourse for their grievances.

**Section 53.2 Definitions**

(A) **CORRECTIVE ACTION** means any documented oral warnings, written warnings, probation or suspension generated by administration/management.

(B) **DISCRIMINATE** means to refuse to hire, to terminate or to treat a person differently with respect to promotion, compensation or other terms or conditions of employment.

(C) **EMPLOYEE** for the purposes of this ordinance shall mean any individual and/or appointee hired or appointed by the Stockbridge-Munsee Community or any subordinate organization thereof.

(D) **EMPLOYEE HANDBOOK** means the "Information Handbook for Employees of Mohican Nation" effective October 1, 1996, as amended, or any successor document prepared for employees and adopted by the Tribe.

(E) **ESTABLISHED POLICIES AND PROCEDURES** means the policies, guidelines and procedures published in the Employee Handbook and its inserts or in resolutions or ordinances adopted by the Tribal Council.

(F) **EXEMPT EMPLOYEES** means employees exempt from the overtime pay provisions of the Tribal Fair Labor Standards Ordinance. Exempt employees are compensated on a salary basis and do not earn

overtime pay for hours worked over 40 hours per week.

(G) **NONEXEMPT EMPLOYEES** means all employees who are not exempt employees.

(H) **ORIENTATION PERIOD** means a period of up to 120 days during which employees are subject to rigorous performance evaluations. Failure to meet performance standards will result in termination of employment consistent with established personnel policies and procedures of each existing tribal employment division. Such termination may occur at any point during the orientation period. The Tribal Council may designate by motion or resolution an exception to the 120-day limit for those positions such as law enforcement officers or others, where the nature of the job requires a longer orientation period.

(I) **POLITICAL APPOINTEES** means those employees who are hired by the Tribal Council and serve at the pleasure of the Tribal Council. **POLITICAL APPOINTEES** are high level executive positions that are so vital to the execution of the Tribal Council's policies that the Council must be free to entrust the positions to individuals who enjoy the Council's complete confidence. Political appointments are not subject to the employment posting policy.

(J) **PROBATIONARY EMPLOYEES** means employees who have not successfully completed the Orientation Period.

(K) **REASONABLE ACCOMMODATION** means reasonable modifications or adjustments to the work environment or to the manner or circumstances under which a position is customarily performed, that enable a qualified person with a disability to perform the essential functions of the position if such accommodation does not cause the Tribe, or the employing agency of the Tribe, undue hardship. "Reasonable accommodation" does require measures that would result in an expenditure of tribal funds.

(L) **RESTRICTED DUTY** means restrictions on an employee's hours or work duties that temporarily prevent the employee from performing all essential job duties but which do not prevent the employee from performing some essential job duties, provided such restrictions are recommended by a physician, subject to review by a physician selected by the Tribe.

(M) **SEXUAL HARASSMENT** means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. **SEXUAL HARASSMENT** includes conduct directed by a person at another person of the same or opposite sex. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.

### **Section 53.3 Guaranteed Employee Rights**

The Stockbridge-Munsee Tribal Council ordains that all employees, exempt or nonexempt, are guaranteed basic employment rights as outlined in the following areas:

(A) All employees are eligible for unemployment compensation in accordance with applicable laws, rules and regulations as adopted by the Stockbridge-Munsee Tribe.

(B) The Tribe recognizes basic human rights in the workplace in regard to age, sex, disability, race, creed, religion, political affiliation, national origin, color, sexual orientation, marital status and ancestry. Subject to the Tribe's Employment Preference Ordinance, employees shall not be discriminated against for these basic rights, provided that:

(1) This paragraph shall not infringe on the right of the tribal government to discriminate based on tribal political affiliation with respect to political appointees.

(2) It is not a violation of this Ordinance to treat a person differently based on disability if the disability prevents the person from adequately performing all essential job duties and no reasonable accommodation is available.

(3) It is discrimination based on sex to discriminate based on pregnancy, childbirth, maternity leave or related medical conditions.

(4) It is not a violation of this Ordinance to discriminate based on sex where sex is a bona fide occupational qualification.

(C) Employees shall be entitled to leave benefits consistent with the federal Family Medical Leave Act, unless superseded by a tribal Medical Leave Act.

(D) While the Tribal Council has exercised its sovereign right to bar labor union organizing from the reservation, it recognizes the right of employees to meet during nonworking hours to discuss their common interests in regard to employee workplace issues and concerns without threat of retaliation or dismissal.

(E) Employees shall be entitled to certain compensated vacation time, sick time, funeral leave, National Guard and reserve call-up time as provided under the established policies and procedures.

(F) Employees shall be entitled to a compensated leave during jury duty and court ordered or subpoenaed appearances, pursuant to established policies and procedures.

(G) An employee unable to vote during nonworking hours shall be granted reasonable time off with pay to vote in any tribal, federal, state or local election according to established tribal policies and procedures.

(H) The Tribe guarantees equal pay for men and women doing the same job and who would otherwise be compensated equally based on experience, education, performance and years of service.

(I) The Stockbridge-Munsee Tribe prohibits all types of sexual harassment. All employees shall be treated with courtesy, respect and dignity while employed by the Tribe and all of its agencies. Employees should immediately report sexual harassment to the appropriate person as identified in the Employee Handbook at which time an investigation in accordance with the established policies and procedures shall take place.

(J) Employees' privacy shall be protected in the following ways:

(1) Personal records, including background investigations, developed during the hiring process and actual employment will be safeguarded from unauthorized use.

(2) Interview boards shall maintain full confidentiality of information given during their involvement in the hiring process with a failure to do so resulting in disciplinary action up to and including termination. Tribal employers and departments shall not collect information about employees that is not job related and based on business necessity.

(3) An employee may review and copy his or her personnel files except for those items regarding:

(a) records relating to the investigation of possible criminal offenses committed by the employee;

(b) letters of reference for the employee;

(c) materials used by employers for staff management, including judgments and recommendations concerning future salary changes, promotions or job assignments or other comments on ratings used for planning purposes;

(d) information that would invade another person's privacy; or

(e) records relevant to a pending claim between the employer and the employee which are discoverable in a judicial proceeding.

(4) Except in the case of employees whose previous drug test has produced a positive finding or is under suspicion of drug use, no employee shall be subjected to random drug testing more than three (3) times in any twelve (12) month period, consistent with Tribal drug testing policy.

(K) The Stockbridge-Munsee Tribe ordains that any Employees Assistance Policy ("EAP") in effect at the time of employment will be enforced. Employees failing related testing procedures, including those for medical problems, will be provided treatment pursuant to the EAP, provided the employee has not been guilty of conduct which merits termination.

(L) Tribal employees are not to be retaliated against, harassed or dismissed by supervisors or any other person when they report to the tribal government, violations of any rules, regulations, laws, ordinances, policies at any level of government or employment.

(M) Employees may not be terminated from employment without just cause.

(N) Established personnel policies and procedures shall reflect the above listed rights ordained by this Employment Rights Ordinance.

### **Section 53.35 Other Rights**

The rights under this section are listed as employee rights, but are not subject to grievances under Section 53.4.

(A) Employees shall be subject to the Tribal Fair Labor and Standards Ordinance.

(B) Employees shall be covered under existing rules and regulations concerning Workers Compensation and Disabilities as adopted by the Stockbridge-Munsee Tribe.

(C) The Stockbridge-Munsee Tribe ordains a safe work place including buildings, environment, equipment, safe work practices safety education and training.

(D) The Tribe will enforce policies in the workplace to protect its employees from harassment and sexual harassment such as: threats, intimidation, physical or verbal abuse, from co-workers or non-employees during working hours.

#### **Section 53.4 Employee Appeals to Tribal Court**

(A) As a part of the Stockbridge-Munsee Community's commitment to protect the rights of its employees and promote a stable working environment, the following appeal process is made available to each employee:

(1) Only violations of those employee rights enumerated in Section 53.3 of this Ordinance are appealable to the Tribal Court. All other issues must be handled through an internal grievance process as provided for in the Employee Information Handbook. The internal grievance process shall be the final recourse for all issues not expressly enumerated in Section 53.3.

(2) The employee must exhaust the internal grievance process before the Tribal Court appeal process will be available to him or her.

(a) In cases of employee terminations, the employee may choose to waive the internal grievance process and file a claim directly with the Tribal Court.

(b) In all other cases, where the employee can demonstrate to the Human Resources Director or his or her designee, that exhaustion of the internal grievance process would not further the process of resolving the problem, for whatever reason, then the requirement may be waived by the Human Resource Director and the appeal may be taken directly to Tribal Court.

#### **Section 53.45 Statute of Limitations**

The employee must initiate the internal grievance process or court action, whichever applies, within 30 calendar days of the event or events that gave rise to the employee's claim.

#### **Section 53.5 Court Procedures**

(A) The petition filed in tribal court under this Ordinance may be in any written format, but shall include at least the following information:

(1) The name and address of the petitioner.

(2) A statement identifying which of the enumerated rights under Section 53.3 has been violated.

(3) A brief description of the facts and events that gave rise to the alleged violation, including the names of potential witnesses and the name of the petitioner's supervisor, if applicable.

(4) A specific request stating the required relief. Relief is governed by subsection (F) below.

(B) After the filing of the petition, the employer shall file a written answer within 20 days.

(C) After the filing of the answer, the Court shall schedule an initial informal conference with the parties to discuss preliminary matters, including but not limited to, scheduling, motions, discovery and whether there is any possibility of the parties reaching a settlement.

(D) If the parties are unable to settle the matter, the Court shall schedule the matter for a trial no later than 30 days after the initial conference.

(E) At the trial, the petitioner shall carry the burden of showing by a preponderance of the evidence that a violation of the rights enumerated in Section 53.3 occurred.

(F) Upon a finding by the Court based upon credible evidence that a violation has occurred, the Court may order any of the following remedies:

(1) Back pay not to exceed one (1) year's wages.

(2) Reinstatement.

(3) Any other non-monetary remedy which is narrowly tailored to remedy the violation.

(G) The Stockbridge-Munsee Community provides a limited waiver of sovereign immunity for the purposes of permitting claims arising under Section 53.3 and allowing only those remedies identified in subsection (F) above.

(H) Any settlement agreement reached by the parties shall be presented in writing to the Court.

(I) Peacemaking is permitted for employee disputes. Any peacemaking shall be in accordance with the Tribal Peacemaker Ordinance.

#### LEGISLATIVE HISTORY

Employee Rights Ordinance approved by Tribal Council June 28, 1995, by Resolution No. 1505-95.

Employee Rights Ordinance amended by Tribal Council, January 6, 1998, by Resolution # 01-98.

### **CHAPTER 54**

#### **STOCKBRIDGE-MUNSEE TRIBAL LAW**

#### **EMPLOYEE PREFERENCE POLICY ORDINANCE**

**Purpose:** Optimum employment of Indian people in the Stockbridge-Munsee Community, as well as those who live in the Community as spouses or related family members, is a critical element to building self-sufficiency, sovereignty and an economy that combats poverty and social ills, and assures that the Stockbridge-Munsee Community receives the maximum benefits generated by its entities and enterprises.

The discriminatory employment practices that Indian people often confront in society must not be tolerated within the jurisdiction of the Stockbridge-Munsee Band of Mohicans.

The purpose of this ordinance therefore is to provide maximum employment opportunity and preference in hiring, promotion, transfer, training, lay-offs, interim appointments and all other aspects of employment to the people of the Stockbridge-Munsee Community.

#### **Section 54.1 Definitions**

- (A) "Employee" means any person paid wages, salary, or stipend by the Stockbridge-Munsee Community or any of its entities and enterprises.
- (B) "Employer" means the Stockbridge-Munsee Community, its subdivisions, entities and enterprises. The definition of employer also includes the Mohican Housing Authority.
- (C) "Preference" means people will be employed according to a priority listing as long as they meet qualifications of the job description or job announcement.
- (D) "Meet Qualifications" means that the applicant or employee possesses the skills, education, experience or other job-related requirements in the job description or job announcement.
- (E) "Enrolled Member" means a person who is officially enrolled as a member of the Stockbridge-Munsee Band of Mohican Indians.
- (F) "Direct Descendant" for purposes of this ordinance means any person whose biological father or biological mother is an enrolled member of the Stockbridge-Munsee Band of Mohican Indians.
- (G) "Spouse" means legally married spouse of an enrolled member of the Stockbridge-Munsee Band of Mohican Indians.
- (H) "Other Indian" means any person who is enrolled as a member of a federally recognized or state recognized Indian tribe or any other Tribe recognized by the Stockbridge-Munsee Tribal Council.

#### **Section 54.2 Establishing Preference**

- (A) Preference shall be given according to Section 3 below when it is established that the employee or applicant meets qualifications as stated in the job description or the job announcement. If the person has the qualifications as stated, he or she is eligible for the position and shall not be denied if another person at a lower preference has higher qualifications than are necessary for the position. If more than one person at the same preference level meets qualifications the decision-makers shall have discretionary power. Accordingly, when preparing job descriptions or job announcements care should be taken to establish qualifications that fit the desired needs of the position.
- (B) It shall be prohibited to use job qualifications or personnel requirements which are not necessary to

the position and which act as barriers to employment preference.

### **Section 54.3 Order of Preference**

(A) The following order of preference shall be given when offering employment opportunities of any kind including hiring, promotions, transfers, training, lay-offs, interim appointments, and all other aspects of employment:

- (1) Enrolled member.
- (2) Direct Descendant.
- (3) Spouse.
- (4) Other Indian.

### **Section 54.4 Coverage**

This ordinance shall be binding on all entities, enterprises, and organizations operating under the Stockbridge-Munsee Community, and shall supersede all previous actions and policies regarding Indian preference in employment.

### **Section 54.5 Enforcement**

(A) The Human Resources Department and/or hiring entities shall have the responsibility and authority to assure that the provisions of this ordinance are implemented.

(B) In addition, before any employee is hired, the hiring committee or hiring official must complete an Employment Preference Compliance Report which is included at the end of this Ordinance as Appendix A.

(C) The Employment Preference Compliance Report must be completed and signed by the appropriate Human Resources Director.

**COMMENT:** Section 5 (C); this section is intended to take into account the different tribal entities. The Tribe already has more than one Human Resources Director; non-Casino and Casino.

### **Section 54.6 Effect of Stockbridge-Munsee Employee Rights Ordinance**

When interpreting any section of this ordinance, this ordinance and the employee rights ordinance shall be read as working together to give the employee or applicant the maximum benefits of both ordinances. Furthermore, if there is any dispute or conflict between the language and provisions of this ordinance and the employee rights' ordinance, those disputes shall be resolved in favor of the employee or applicant.

### **Section 54.7 Effective Date and Amendments**

(A) This ordinance shall be effective upon the approval of a resolution adopting same by the Stockbridge-Munsee Tribal Council.



(B) This ordinance may be amended by resolution of the Stockbridge-Munsee Tribal Council.

**Section 54.8 Remedies; Limited Waiver of Sovereign Immunity for Purposes of Enforcement**

(A) In order to enforce the provisions of this ordinance, the Stockbridge-Munsee Community shall be subject to suit in the Stockbridge-Munsee Tribal Courts by employees or applicants in accordance with the limitations of this section.

(B) Money damages shall not be available in any suit brought under this ordinance. The sole remedy available to the aggrieved party shall be the appointment to the job, promotion, transfer, or interim appointment that was denied as a result of a violation of this ordinance. The complainant may also be awarded a similar unfilled position if one is available.

(C) Any complaint brought under this Ordinance must be filed in Tribal Court within 5 business days of receipt of notice that the complaining applicant did not receive the position. Complaints brought more than 5 days after notification shall not be heard.

**LEGISLATIVE HISTORY**

**Ordinance to establish Employment Preference Policy adopted by Resolution**